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REPORTS

OF

CASES

ADJUDGED IN THE

Court of King's Bench,

Since the *Death* of LORD RAYMOND.

In FOUR PARTS;

Distributed according to the Times of his four Successors, LORD HARDWICKE, SIR WILLIAM LEE, SIR DUDLEY RYDER, and LORD MANSFIELD.

By Sir JAMES BURROW,

Master of the *Crown-Office*, and one of the *Benchers* of the Honourable Society of the *Inner-Temple*.

With TWO TABLES,

One, of the NAMES of the CASES; the Other, of the MATTER contained in them.

DUBLIN:

PRINTED BY R. MONCRIEFFE, No. 16, CAPEL-STREET.

M,DCC,LXXXV.



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PART THE FOURTH.

VOLUME THE FIRST;

Beginning with *Michaelmas* Term 30 *Geo.* 2. 1756.

The FOURTH EDITION: In which the TABLE of the PRINCIPAL MATTERS is much *enlarged*.

DUBLIN:

PRINTED BY R. MONCRIEFFE, No. 16, CAPEL-STREET.

M,DCC,LXXXV.


BRITISH MUSEUM
1845

PREFACE.

IT may naturally be aſked—" Why I publiſh " *at all?*" " Why I begin from Lord RAY-" MOND's *Death*, rather than from any *prior* Æra?" " Why I have *poſtponed* the three former Parts " of this Work; and publiſhed the *fourth* Part " *firſt?*" " Why I venture to print, without the " Sanction of a *Licence*, to authenticate my Re-" ports?"

IN ANSWER to the *firſt* Queſtion—

I found myſelf reduced to the Neceſſity of either *deſtroying* or *publiſhing* theſe Papers (which were originally intended for my own private Uſe, and not for public Inſpection.) For as it was become generally known " that I had taken *ſome* Account, " (good or bad,) of all the Caſes which had oc-" curred in the Court of King's Bench for up-" wards of * 40 Years," I was ſubject to conti-nual Interruption and even Perſecution, by in-ceſſant Applications for Searches into my Notes; for Tranſcripts of them; ſometimes for the Note-books themſelves, (not always returned without Trouble and Solicitation;) not to mention fre-quent Converſations upon very dry and unenter-taining Subjects, which my Conſulters were *paid* for conſidering, but I had no Sort of Concern in. This Inconvenience grew from bad to worſe, till it became quite inſupportable: And from thence ariſes the preſent Publication.

* 'Tis now upwards of 45 Years.

IN ANSWER to the *ſecond* Queſtion—

My Notes taken *at the Bar*, previouſly to my becoming *Clerk of the Crown*, had no particular

Claim

Claim to the leaſt Degree of AUTHENTICITY: —Therefore I do not preſume to expoſe *them* to public View. But when I entered upon that Office, I thereby came to have all the Records and Rule-books on the *Crown*-ſide of the Court in my own Power, and could inſpect or tranſcribe them at Pleaſure: Beſides which, as I never after that Time ſtirred out of Court till it roſe, I was ſure to miſs nothing that paſſed in it. Add to this, That I had *now*, by my Situation in the very Middle of the Court, better Convenience both of Hearing and Writing, than I had had at the Bar, in the outermoſt Rows. I then came to have alſo better Opportunities of procuring true States of the Caſes on the *Civil* Side of the Court.

Lord RAYMOND and my immediate Predeceſſor in Office happening both to die in the* ſame Vacation, I was ſworn into my preſent Office as ſoon as the Court ſat after Lord RAYMOND's Deceaſe, *viz.* on the firſt Day of *Eaſter* Term 6 G. 2. 1733. LORD RAYMOND's *Death* ſeems therefore to be the fitteſt *Æra* from whence to begin; and the rather, becauſe his Lordſhip's *own* Reports (ending with *Trinity* Term 5° & 6° G. 2. 1732.) have been publiſhed ſince his Death.

* *Hilary* Vacation, 6 G. 2. 1732-3. *viz.* Mr. *Bellamy*, on the 9th and Lord *Raymond* on the 18th of *March*.

* At *this* Time alſo, the Garb of Common-law Pleadings was entirely changed, and modernized. * A Statute now took Place, for converting them from a fixed dead Language to a fluctuating living one; and for altering the ſtrong ſolid compact Hand (calculated to laſt for Ages) wherein they were uſed to be written, into a Species of Hand-writing ſo weak, flimſy and diffuſe that (in Conſequence and Corruption of this Statute, though undoubtedly contrary to its Intention,) many a modern Record will hardly outlive its Writer, and few perhaps will ſurvive much above a Century.

* From 25th *March* 1733.

* 4 *Geo.* 2. *c.* 26.

In

In ANSWER to the *third* Queſtion—

THERE are *many* Reaſons which induced me to follow the Example ſet by the Publiſher of Sir GEORGE CROKE's Reports.*

* See Sir *Harbotle Grimſton's* Preface to *Cro. Car.*

LATE Caſes are moſt ſought after: And therefore that Deſire of being delivered from daily Importunity, which obliged me to publiſh, is a ſtrong Motive to my publiſhing in *this* Order.

As my Reports can be of *no Authority*, Gentlemen may ſupply that Defect, where the Caſes are ſo recent, from their *own* Notes: And my Book may be of Uſe as an *Index*.

By Beginning with *this* Part, (where many Gentlemen now alive can ſet me right), I ſhall make an Experiment "Whether my Faults and Miſ-"takes are ſo great, as to make it adviſeable for "me to ſuppreſs the Reſt."

I the rather begin with this Part, to prevent the Publication of worſe and more inaccurate Notes. Some Encouragement to the moſt faulty might be expected, from the Impatience of the Profeſſion, for Reports during this Period. And their Impatience is not to be wondered at. There never was more Buſineſs. The Reaſoning and Opinions of the Judges never gave more Satisfaction. *All* the Seats were never ſo filled together. And (what never happened before, during a like Period,) ſince the 11*th* Day of *November* 1756 to this Day, there never has appeared in Court the leaſt Difference of Opinion: Every Rule, Order, Certificate and Judgment have been *unanimous*. The Books of Reports are ſo full of frequent Difference of Sentiments in the Court, (both haſty and deliberate,) that for *All*

to

to agree ſo long, through ſuch an infinite Variety of Buſineſs, in every Concluſion upon every Queſtion of every Kind, argues uncommon Knowledge, Capacity and Temper in *All*. The Authority of right Judgments, upon right Principles, given unanimouſly by Magiſtrates who *add* Weight and Dignity to the higheſt Offices, inſtead of *deriving* any from them, is ſo great, that the direct Point determined becomes a RULE for ever, and eſtabliſhes *Certainty*, the Mother of Security and Peace.

The Extraordinary Ability with which *every* Seat upon the Bench has been filled during this Period, has ſuffered nothing to *hang undecided*. A *new* Plan of *Diſpatch* has brought every Matter *ſpeedily* to a *Concluſion*; in ſpite of the Parties themſelves, their Counſel and Attornies; in ſpite of mutual Dilatorineſs, Negligence and Complaiſance; in ſpite of Artifice by that Side which finds an Intereſt in protracting; in ſpight of every Contrivance which can be ſuggeſted to a Defendant who means only Delay.

Some hundred Cauſes end, every Year, at the Sittings, which are not heard of *in Court*. (For the Judgment is conſequential, and of Courſe;) Many of them, within a few Months after their Commencement. Where there is a *ſpecial* Caſe or Verdict at the Sittings, it is dictated by the Court, and ſigned by the Counſel *before* the Jury is diſcharged. If, in ſettling it, any Difference ariſes about a *Fact*, the Opinion of the Jury is taken, and the Fact is ſtated accordingly: Whereas they *uſed* to be left to *future* ſettling; which often occaſioned much Altercation and many Attendances before the Judge; ſometimes, a new Trial, to fix a Fact; always a great *Delay*. They muſt *now* be ſet down in the Paper, for Argument within *four* Days; They muſt be argued in *Courſe*, as they ſtand: Altho' both Sides ſhould *conſent*; they cannot be put off, but for ſpecial and ſufficient

Reaſons

Reaſons appearing by *Affidavit* (if neceſſary,) and upon *Motion* made a Day or two before. Nothing ſtops on Account of the *Abſence* of any of the Judges: Whereas nothing (of this Kind) uſed to come on, unleſs the Court was *full.*

The Judges being appriſed of this Caſe and Queſtion from their Paper-books, give Judgment, in many Caſes, *immediately*, upon the *firſt* Argument; and refuſe a *ſecond*, unleſs they themſelves think the Queſtion *requires* more Examination. It very ſeldom happens that there are more than *two* Arguments: Whereas I remember three or four to have been common; and it was not thought proper, to refuſe hearing a ſecond, third, or even fourth Argument, if *either* Side preſſed for it, though the Court themſelves had no Doubt.

All Motions or Rules in Matters of *Length* or *Conſequence* are appointed for *particular Days*, and called on *firſt*: Whereas they uſed to take their *Chance* of being moved by Counſel in their Turn; and thereby were often kept back till the laſt Day of the Term, and then (for want of Time) neceſſarily put off to the *next Term*, and ſo on (with good Management) from Term to Term.

Beſides theſe *ſpecial* Appointments, *all enlarged* Rules muſt come on, peremptorily, during the *firſt Week* of the Term.

There are *more* OPINIONS of the *Court* during this Period, upon *important* Points, than ever were given during the like Number of years: And I do not remember a ſingle Inſtance where the Determination did not give general Satisfaction. Every Caſe which the Anxiety of Parties has carried to the Houſe of Lords, has been *unanimouſly affirmed.*

SIR

Sir John Strange was obliged to omit many of the beſt and moſt intereſting Arguments; becauſe they were in Cauſes *not adjudged*, and therefore of no Uſe to the Public: But during *this* Period, that Reaſon does not hold for omitting ſuch Arguments *cloſed*. And among the Queſtions decided, there are ſome that had laſted *very long* indeed.

As the Public are *already* poſſeſſed of Sir John Strange's Reports, comprehending *all* my *firſt*, and a great Part of my *ſecond* Period, That is another Reaſon inducing me to publiſh mine in the Order I have choſen: Though I think the Authority of Sir Harebotle Grimston, and the Reaſons he * urges, are *alone* ſufficient to juſtify it.

* See his Pref. to *Cro. Car.*

In Answer to the *fourth* Queſtion—

This Difficulty alarms me *moſt*.

I know it is a Contempt of *this* Court to publiſh their Proceedings: It is againſt a ſtanding Order of the Houſe of Lords to publiſh Proceedings there, upon Appeals or Writs of Error. They ought to be publiſhed under *authoritative* Care and Inſpection: But since the *Year-books*, no judicial Proceedings have been ſo publiſhed, either by the Houſe of Lords, or by any Court in *Weſtminſter-Hall*, except State-Trials.

Licences by the Chancellor and Judges proceed upon the Character of the Reporter *only*; without ſaying a Word of the *Work* itſelf, or that the Licenſers ever *ſaw* it. Such Licences (to allow and approve of the printing and publiſhing) took their *Riſe* from the Neceſſity of a Licence to print, as the Law *formerly* ſtood; and have *continued* in the *ſame* Form of Words (without any Meaning,) *ſince* the *Reaſon* of them has *ceaſed*.

I have

I have been assured, that SOME now possessed of judicial Offices have declared "They *never would* "sign one; because it hangs out false Colours, "and misleads those who think it gives the least "Approbation or Authority to the WORK."

SUCH a Licence, could it have been obtained, would still have left my REPORTS to stand upon their *own* merit: And I flatter myself that I am too well known in *Westminster-Hall*, to want a Testimonial to my CHARACTER.

I had not the Impudence to *attempt* getting an Approbation of the WORK. It cannot be expected that the *Judges* should find the Time or take the Trouble to revise it; or that they would do it, upon any Application whatsoever. (Which makes it the more to be lamented that the Usage of Year-books hath ceased.)

UPON *these* Considerations, I have ventured to follow the Example of *Mr. Justice* FOSTER, and to publish my Notes WITHOUT *any* Leave or Licence.

There are many Instances where Men who have published Matter relative to a Cause *depending*, or *soon* after it was over, have been punished as guilty of a Contempt; most justly and wisely, for many Reasons: But a Publication of Reports at a *Distance of Time*, merely as a Matter of *Science*, has not been animadverted upon; though within the *Letter* of the Law. Where they have been published *surreptitiously*, without Consent of the Reporter, the Printers have been proceeded against *civilly* upon the Foundation of his Property; but *not criminally*: And after the surreptitious Edition has been stopped by Injunction, the Book has been published with Consent of the Reporter, *without*

without Leave or Licence; and NO *Notice* taken, or *Complaint* made of it.

I truſt my Excuſe, (as Mr. Juſtice *Foſter* did) to my INTENTION. If I find I have done wrong, or that I give Offence, I will certainly put a *Stop* to *this* Part, and *ſuppreſs* the *other three*.

The Work muſt make its *own* Way in the Profeſſion. Its Merit conſiſts in the Correctneſs of the *States* of the Caſes. In *this* Reſpect, it muſt be of *ſome* Uſe; eſpecially when compared with other Notes. In all *other* Reſpects, I known it is very faulty: And I beg Pardon of the *Bar*, and much more of the BENCH, for innumerable Injuries I muſt have done them, as to Language and Argument. I do not take my Notes in Short-hand. I do not always take down the *Reſtrictions* with which the Speaker may *qualify* a Propoſition, to guard againſt its being underſtood univerſally, or in too large a Senſe. And therefore I caution the Reader, always to *imply* the Exceptions which ought to be made, when I report ſuch Propoſitions as falling from the Judges. I watch the *Senſe*, rather than the *Words*; and therefore may often uſe ſome of my own. If I chance not fully to underſtand the Subject, I can then only attend to the *Words*; and muſt, in *ſuch* Caſes, be liable to Miſtakes. If I do not happen to know the Authorities ſhortly alluded to, I muſt be at a Loſs to comprehend (ſo as to take down with Accuracy and Preciſion) the *Uſe* made of them. Unavoidable Inattention and Interruptions muſt occaſion Chaſms, Want of Connexion, and Confuſion in many Parts: which muſt be patched up and connected by Memory, Gueſs or Invention; or thoſe Paſſages totally ſtruck out, which are ſo inexplicably puzzled, in the original rough Note, that no Glimpſe of their Meaning remains to be ſeen

I am

I am thoroughly aware of all theſe Faults. I am conſcious too, that not having had the good Fortune of acquiring that Knowledge in the Science of the Law, which is gotten only by a lucrative Experience at the Bar, (from which I was very early removed;) and not being bleſſed with the quickeſt natural Parts, I may have miſapprehended Topics and Alluſions; I may have made Blunders in the Senſe, by endeavouring to rectify thoſe of my Pen. *Theſe* are Imperfections which Diligence could not cure. I am only concerned, leſt my Errors ſhould be imputed, not to myſelf, but to thoſe whoſe Diſcourſes I may happen (through my own Infirmities) to miſrepreſent.

Therefore let me, once for all, caution the Reader, eſpecially the young Student: I pledge my Credit and Character, ONLY "that the *Caſe* "and *Judgment*, and the *Out-lines* of the Ground "or Reaſon of Deciſion are right." As to the *Reſt*—I took the Notes, for my own Amuſement and Uſe: where the Matter or Manner is liable to Objection, It may probably have ariſen from my Miſtake.

I have *omitted* all Caſes where the Queſtion turned upon FACTS and EVIDENCE *only*; or where the Order followed almoſt of *Courſe*, in Conſequence of Maxims fully ſettled; or was *not conteſted*.

I have *omitted* common *Sentences* in ordinary criminal Proſecutions; and, in ſhort, every Thing which I thought could not be of general Uſe.

Before I conclude, I muſt again entreat the Indulgence and Forgiveneſs of the *Bar*, and ſtill more, of the BENCH, for the Wrong I may have done them.

If

If the Candid and Judicious ſhall give a favourable Reception to *this* Part, it may encourage me to finiſh my Deſign, and publiſh the preceding Periods.

INNER TEMPLE,
29th *Nov.* 1765. *James Burrow.*

ADVER-

ADVERTISEMENT.

☞THE BODY of this Book is calculated for ſuch as may be inclined to look into it at their Leiſure: The ABRIDGMENT, for ſuch as deſire only a Summary Account of the Determinations.

The FORMER is therefore deſignedly *copious:* For, "* IMPERFECT Reports of Facts and Circumſtances, eſpecially in Caſes where *every* "Circumſtance weigheth Something in the Scale "of Juſtice, are the Bane of all Science that dependeth upon the Precedents and Examples of "former Times."

* See Mr. Juſtice *Foſter's Diſcourſes on the Crown-Law*, p. 294.

The *Latter* was meant to be as *conciſe* as the Nature of a *complete* Abridgment would bear.

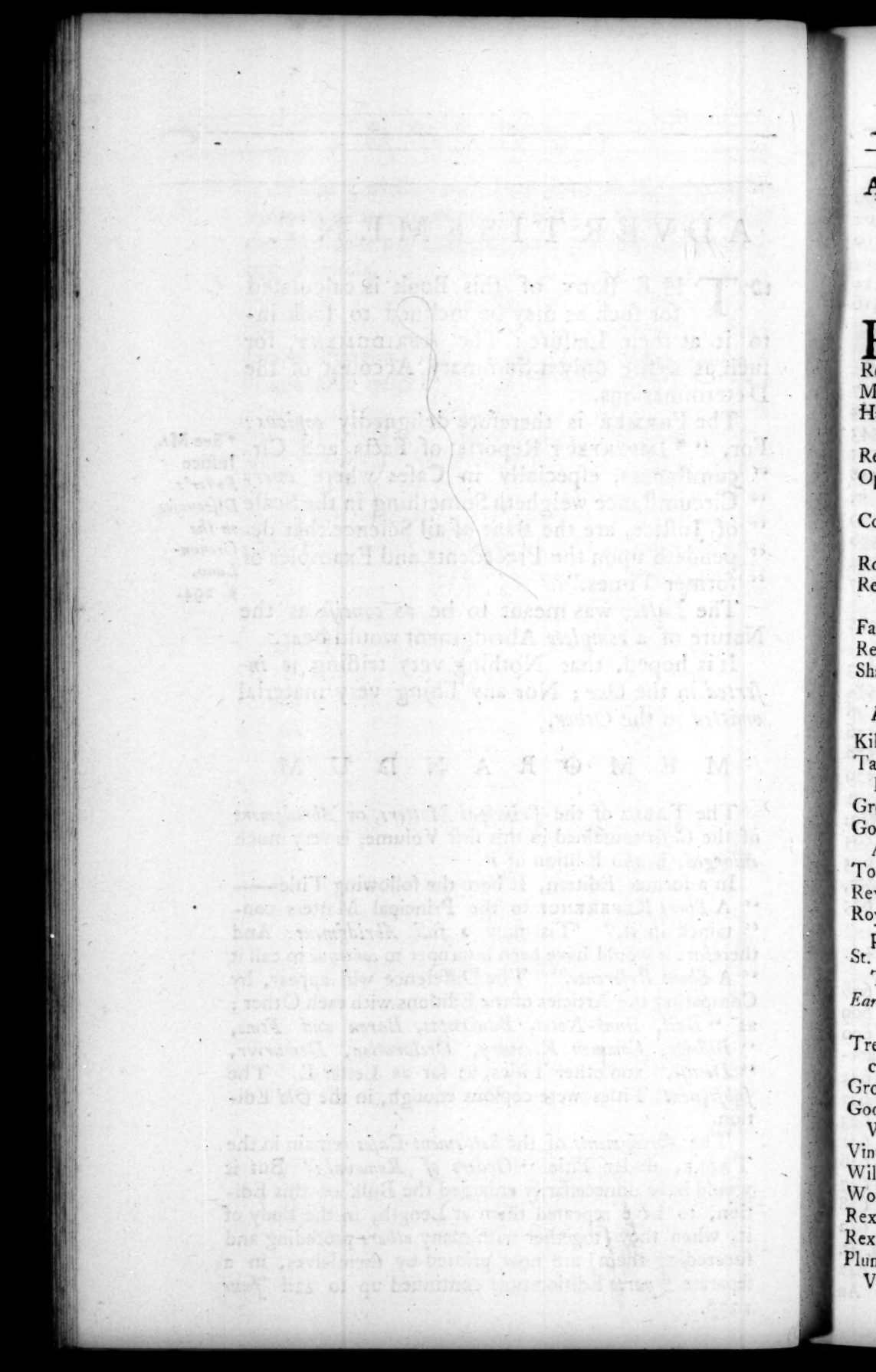
It is hoped, that Nothing very trifling is *inſerted* in the *One*; Nor any Thing very material *omitted* in the *Other*.

MEMORANDUM.

The TABLE of the *Principal Matters*, or *Abridgment* of the *Caſes* contained in this firſt Volume, is very much *enlarged*, in *this* Edition of it.

In a former Edition, It bore the following Title—— "A *Short* REFERENCE to the Principal Matters con-"tained in it." 'Tis now a *full Abridgment:* And therefore it would have been improper to *continue* to call it "A *Short Reference.*" The Difference will appear, by Comparing the Articles of the Editions with each Other; as "*Bail, Bank-Notes, Bankrupts, Baron and Feme,* "*Biſhops, Common Recovery, Declaration, Demurrer,* "*Deviſe,*" and other Titles, as far as Letter L. The *ſubſequent* Titles were copious enough, in the *Old* Edition.

The *Abridgments* of the *Settlement-Caſes* remain in the TABLE, under Title "*Orders of Removal:*" But it would have unneceſſarily enlarged the Bulk of this Edition, to have repeated them at Length, in the Body of it, when they (together with many *others* preceding and ſucceeding them) are now printed by themſelves, in a ſeparate *Quarto* Edition now continued up to 22d *June* 1776.



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Michaelmas Term

30 Geo. 2. 1756.

The Court of KING's BENCH

(When it became complete, on the 3d Day of the Term, as below,) was compoſed of

(*a*) *Lord* Mansfield,
(*b*) *Sir* Thomas Deniſon,
(*c*) *Sir* Michael Foſter, *and*
(*d*) *Sir* John Eardly Wilmot.

(*a*) His *Lordſhip* was ſworn in, upon the 8th of *November* 1756: And took his Seat upon the Bench, on the 11th of the ſame Month.

(*b*) Mr. Juſtice *Deniſon* was ſworn in, upon the 11th of *February* 1741: And took his Seat, the next Day.

(*c*) Mr. Juſtice *Foſter* was ſworn in, upon the 22d of *April* 1745: And took his Seat, upon the 1ſt of *May* following, (being the firſt Day of *Eaſter* Term 1745.)

(*d*) Mr. Juſtice *Wilmot* was ſworn in, upon the 11th of *February* 1755: And took his Seat upon the Bench, the next Day.

Michaelmas Term 1756. 30 Geo. 2. B. R.

Monday 8th *November* 1756.

His Majeſty's Attorney General, the Honourable *William Murray*, was, this Morning, called Serjeant; and about eight in the Evening, was ſworn in Lord Chief Juſtice of this Court, (in the Room of the late Lord Chief Juſtice, Sir *Dudley Ryder*, who died on the 25th *May* 1756) before the Lord Chancellor (the Earl of *Hardwicke*,) at his Houſe in *Great Ormond-ſtreet*, in the Preſence of the three Judges and of moſt of the Officers of the Court of King's Bench.

His Lordſhip took the Oaths of Allegiance and Supremacy on his Knee; and the Oath of Office, ſtanding. Immediately afterwards, the Great Seal was put to a Patent, which had before paſſed all the proper Offices, creating his Lordſhip BARON of MANSFIELD in the County of *Nottingham*, to Him and the Heirs Male of his Body.

Thurſday 11th *November* 1756, Lord *Mansfield* took his Place, as Lord Chief Juſtice.

Raynard *verſus* Chaſe.

Friday 12th *November* 1756.

THIS was an Action of Debt for a Penalty on 5 *Eliz. c.* 4. for exerciſing the *Trade of a* BREWER, without having ſerved an Apprenticeſhip. In the Declaration there were two Counts. To the former "*nil debet*" was pleaded: And there was a general Verdict for the Defendant; (*viz.* "That the Defendant does not owe, *&c.*") But on the 2d Count there was a Special Verdict: Which was to the following Effect; *viz.* that the Defendant

ant *Chaſe* and one *Coxe*, were, and have been, during all the Time charged in this Count, Partners in the Trade; and that the Trade was carried on, and has been for 4 Years carried on, in their joint Names; that *Coxe* did ſerve an Apprenticeſhip, *&c.* but *Chaſe* never did; and that COXE *is a working Brewer*, and was paid a Salary for his Labour: which Salary was always deducted, and allowed to him, *previous* to a Diviſion of the Profits; and the Entries at the Exciſe-office were in their *joint* Names: But that the Defendant *John Chaſe* NEVER *exerciſed* the *Trade* HIMSELF; (which was wholly managed and carried on by *Coxe*;) but *only ſhared the Profits*, and *ſtood the Riſques* of the Partnerſhip. And they find it to be a Trade within 5 *Eliz. c.* 4.

Queſtion, on 5 *Eliz. c.* 4. *ſ.* 31. "Whether the Defendant *John Chaſe* is within the Act, upon this ſpecial Finding."

Mr. *Morton pro Quer'.*

This attempt to evade the Force of the Act by the Scheme of a PARTNERSHIP *with a qualified* Trader, would intirely fruſtrate the *Intention*, and is directly contrary to the *Words* of the Act.

The ſhort of this Caſe is,—*Chaſe not being* HIMSELF *qualified*, takes a PARTNER *who is qualified:* which qualified Partner is the only *acting* Perſon in carrying on the Trade; and *Chaſe never interfered* in it.

There was the like Point before the Court in *P.* 18 *G.* 2. *B. R. Rex* v. *Driffield.*

But, *per Deniſon* and *Foſter* Juſtices, that Caſe was never determined: it went off upon an Objection to the Juriſdiction.

Morton:—But the Lord Ch. J. *Lee* then ſaid, "that he "had never known a Perſon exempted from the Statute, who "had not ſerved an Apprenticeſhip."

And as to his not interfering in the Trade, the Caſe of *Hobbs qui tam, &c.* verſ. *Young*, reported in 2 *Salk.* 610. and in *Carthew* 162. and in 3 *Mod.* 313. is a Determination in Point, and not to be diſtinguiſhed from the preſent Caſe.

Therefore he prayed Judgment for the Plaintiff.

Mr. *Biſhop contra, pro* Defend'. ſaid, he would firſt conſider how this Matter ſtood *before the Statute*, with regard to the free and unlimited Right that every Man naturally and legally had, of exerciſing whatever Trade he pleaſed: 2dly, The *Conſtructions* that have been *favourably* made upon it,

it, *in Extenſion* of the Qualifications to exerciſe Trade; and 3*dly*, diſtinguiſh this Caſe from the Caſes cited.

And firſt, the Liberty of Trade is a natural and Common-law Right; and was long unreſtrained. The Statute of 37 *E.* 3. *c.* 5. which *firſt reſtrained* it, was very ſoon *repealed* by 38 *Ed.* 3. *c.* 2. And Lord *Coke* in 4 *Inſt.* 31. ſays, "That *ſuch* Acts of Parliament never live long." He cited the Caſe in 2 *Bulſtr.* 186. *Dominus Rex and Allen Plaintiffs* againſt *Tooley, Defendant*, as an Authority for him, tho' the Court did not indeed formally pronounce any final Judgment therein: And he alſo cited 11 *Co.* 53. the Caſe of the Taylors of *Ipſwich*. Secondly, The before mentioned Caſe in 2 *Bulſtr.* 186. *The King and Allen* v. *Tooley*, proves the Conſtructions to have been favourable. *Jenk. Cent. caſe* 15. *pa.* 284. "A private Brewer is not within the "Statute." *Keilway* 96. *pl.* 6. proves that the Statute ought to be taken ſtrictly; being penal, and in Derogation of the Common Law. And Judges have diſpenſed with the Rigor of it: As in *Froth*'s Caſe, 1 *Salk.* 67. where 7 Years Apprenticeſhip beyond Sea, though without binding, was holden ſufficient. So *Queen* v. *Muddox*, 2 *Salk.* 613. *S. P.* accordingly: And the Court there call this Statute of the 5th of *Eliz.* a hard Law. *Comberb.* 254. *Rex* v. *Coller: per Eyre* Juſtices, One Brother living with another 7 Years (at the Trade of a Tallow-chandler) though not bound, may ſet up the Trade. 1 *Mod.* 26. *pl.* 69. *Dominus Rex* v. *Tarnith*, proves too that this Statute ought not to be extended further than Neceſſity requires.

Now it is not found by the preſent Special Verdict, in the Affirmative, "That this Man has occupied, uſed and "exerciſed the Trade;" But it is found, (on the contrary,) negatively, "That he has NOT *interfered* in it; but it was "wholly carried on by *Coxe*." And *Hob.* 298, ſays the Rule is, "That Affirmatives in Statutes that introduce "new Laws, imply a Negative, *&c.*" However, here is an *expreſs* Negative.

Thirdly, with regard to the Caſes cited.—

As to *Rex* v. *Driffield*, whatever was found in the Affirmative in that Caſe, is found in the Negative here. And as to the Caſe of *Hobbs* v. *Young*, there was *no Partner* ſkilful in the Trade; but only *Servants*: Whereas here, is a ſkilful Partner to conduct it; and the Servants are employed and ſet to work BY *this Partner*, who is ſkilful; and are *not* employed and ſet on work *by* the Defendant.

Then he added, (4thly,) ſome Arguments *ab inconvenienti*. Firſt,

Firſt, This will affect all great Undertakings; for it ſeldom happens, in ſuch great Undertakings, that *all* the Partners are duly qualified, in Strictneſs. So likewiſe, it would affect all Caſes where *Infants* and *Truſtees* are intituled to Shares of profitable Trades. So, where *Creditors* have Shares in them,

And *Apprenticeſhips*, in *great Breweries*, are not, in Fact, uſual or cuſtomary.

Mr. *Morton*, in Reply, premiſed, that the Rule of Conſtruction upon this Act muſt be *uniform*, with regard to *all* the Trades within it: And *Breweries* cannot be diſtinguiſhed from the reſt.

In anſwer to Mr. *Biſhop*'s Argument, He obſerved,

1ſt, It is of no Importance what was the Right before the Statute: The Statute was made *expreſsly*, to RESTRAIN ſuch Right in future, for the Good of the Public.

2dly, He ſaid, he did not want to *extend* this Law: this Caſe is fully and compleatly *within* it, without ſtraining it at all. And the Conſtructions that Mr. *Biſhop* calls favourable, in the Inſtances which he has cited, are no more than juſt and reaſonable upon the Circumſtances of the reſpective Caſes in which they were made.

3dly, As to the NEGATIVE-*Finding* in the preſent Caſe, it amounts to no more than "that this Man did *not mind his* "*Buſineſs*;" (which the other Partner did.)

And as to ſetting to Work, it is plain that *Coxe* is ſet to work by *Chaſe*; and, *virtually* He ſets all the Servants to Work. Indeed, *Coxe* is here both a Journeyman and a Partner to *Chaſe*: For *Chaſe* pays him as a Journeyman; and, beſides that, gives him a Share of the Profits. And my Lord Ch. J. *Holt*'s Opinion in the Caſe of *Hobbs* and *Young* is quite applicable to the preſent Caſe.

4dly, He endeavoured to ſhew that the conſtruing this Man to be within the Penalty of the Statute, could not be attended with any ſort of Inconvenience.

Therefore He prayed Judgment for the Plaintiff.

As this was the firſt Argument, it was expected (as of Courſe) that it would be argued again: But Lord MANSFIELD gave his Opinion immediately, to the following Effect.

Lord MANSFIELD. Where We have no Doubt, we ought not to put the Parties to the Delay and Expence of a farther Argument; nor leave other Perſons who may be intereſted in the Determination of a Point ſo general, unneceſſarily under the Anxiety of Suſpenſe. The

The Defendant is to ſhare the Profits with *Coxe*, in Moieties; and is liable to the Debts of the Partnerſhip: But it is *poſitively and expreſsly* found, "That during all the Time charged, *He* NEVER ACTED *in or* EXERCISED *the Trade.*" He was not, by the *Terms* of his Agreement, to act in the Trade: The *Other* Partner was to do the Whole, and had a particular Salary on that Account. It is not found that either *Coxe* or any Servant under him was ſet to work by CHASE; nor that *Chaſe* did *any Act* whatever of exerciſing the Trade: He was only concerned in the *Profit.*

Now though this may be, to SOME *Purpoſes*, exerciſing a Trade, in reſpect of third Perſons who deal with the Partnerſhip as *Creditors*, and within the Meaning of the *Statutes concerning Bankrupts*; yet the preſent Queſtion is. "Whether "it be exerciſing a Trade CONTRARY TO THIS ACT."

I think Mr. *Biſhop* has laid his Foundation right, againſt extending the penal Prohibition beyond the expreſs Letter of the Statute.

1ſt, This is a *penal* Law;

2dly, It is in *Reſtraint of natural* Right; And

3dly, It is *contrary to the general* Right given by the *Common Law* of this Kingdom: I will add

4thly, The *Policy*, upon which the Act was made, is, from *Experience*, become doubtful.—Bad and unſkilful Workmen are rarely proſecuted.

This Act was made early in the Reign of Queen *Elizabeth.* Afterwards, when the great Number of Manufacturers who took refuge in *England*, from the Duke *D'Alva*'s Perſecution, had brought Trade and Commerce with them, and enlarged our Notions, the Reſtraint introduced by this Law was thought ſo *unfavourable*, that in 33 *Eliz.* in the Exchequer, 4 *Leon.* 9. *pl.* 39. it was conſtrued away: For it was holden clearly, by the Judges, in that Caſe, (which Conſtruction, however, I take *not* to be Law *now*,) that "if one had been "an Apprentice for 7 Years at *any* One Trade mentioned "within the ſaid Statute, he may exerciſe ANY *Trade named* "*in it*, though he had *not* been an Apprentice to IT."

All theſe Obſervations only ſhew "That this Act, as to what inforces the *Penalty* of it, ought to be taken *ſtrictly*." And accordingly, the Conſtructions made by former Judges have been favourable to the Qualifications of the Perſons attacked for exerciſing the Trade; even where

where they have not *actually* ſerved Apprenticeſhips. They have, by a liberal Interpretation, *extended the Qualifications* for exerciſing the Trade, *much beyond* the Letter of the Act; and have *confined* the *Penalty and Prohibition* to Caſes *preciſely within* the expreſs Letter.

Let Us conſider whether the *preſent* Caſe be within the *Letter*, or even the *Meaning* of this Act.

The *General Policy* of the Act was to have Trades carried on, by Perſons who had *Skill* in them.

Now here, the *perſonal* Skill of the Defendant makes no *real* Difference in the Caſe. For the Perſon who *is* ſkilful, *acts every* Thing, and *receives no Directions* from this Man: He neither did, nor was to interfere.

The Caſe of *Hobbs* and *Young* is not parallel. There, the Defendant, a *ſingle* Man, directed the whole Trade; was the *Maſter*; and *directed* all the Servants. *As between Maſter* and *Servant*, no doubt, it is the *Maſter*, who carries on the Trade; and NOT *the Servant*. But in *Hobbs* and *Young* there was *no Partnerſhip*; nor (what is the diſtinguiſhing Character of the preſent Caſe) a *mere naked* ſharing of the Profits, and riſquing a Proportion of the Loſs; without his acting or directing at all, in any Manner whatſoever.

In many conſiderable Undertakings, it is abſolutely neceſſary to take in Perſons as Partners, to ſhare the Profits and riſque the Loſs. And the general Uſage and Practice of Mankind, ought to have Weight in Determinations of this Sort, affecting Trade and Commerce, and the Manner of carrying them on.

It is notorious that many Partnerſhips are entered into, upon the Foundation of one Partner contributing Induſtry and Skill, and the other, Money.

Many great Breweries and other Trades have been carried on for the Benefit of Infants and Reſiduary Legatees, under the Direction of the Court of Chancery.

Now if the Plaintiff's Conſtruction was to hold, the whole Direction and Decree of the Court of Chancery was contrary to Law and to an expreſs Act of Parliament.

So it is likewiſe practiſed in *other* great Trades. The late Mr. *Child* directed his Buſineſs of a *Banker*, to be carried on for the Benefit of his Children and other Perſons.—Many other Inſtances might be mentioned.

It

It would introduce the utmoſt Confuſion in Affairs of Trade and Commerce, if this Conſtruction ſhould prevail.

On the *other* Hand, I ſee no Inconvenience: It is exactly the ſame Thing as to the Trade, in every Iōta, "whether this Partner has or has not ſerved an Apprenticeſhip."

Therefore I think the Defendant *not* liable to the *Penalty* of 3 *Eliz.*

Mr. Juſt. *Deniſon* ſaid, That this was a new Caſe.

For though the Caſes of *Rex* v. *Driffield*, and *Alcock* v. *Gell*, were indeed before the Court, yet *no Opinion* was delivered in either of thoſe Caſes.

He concurred that it was *not* an *Exerciſe* of the Trade *within* 5 *Eliz.*

The true Intent of that Act was, That no Man ſhould *exerciſe* any of thoſe Trades, unleſs he had *Skill* in them.

It has never been extended, by any liberal Conſtruction of it, in point of inforcing the *Penalty*.

And the preſent Queſtion is, "Whether this Man has "*exerciſed* the Trade, within the Meaning of it, ſo as to be "*liable to the* PENALTY."

Now it is here found, "That he *never* did *interfere* in "the Trade, *Himſelf*." In the Caſe of *Hobbs* v. *Young*, the Defendant was the *Super-Intender* of the Work; and *did exerciſe* the Trade, without having any Skill in it.—And *this* is the *Point in Queſtion*, and the principal Determination, in that Caſe of *Hobbs* v. *Young*; whatever elſe might drop from the Judges in giving their Opinion. But *here*, the Defendant *never meddles at all*; but leaves *all the Management* to a Partner, who had Skill: He himſelf *never acted* in carrying on the Trade.

It may be ſaid indeed, "that *Chaſe* is liable to the *Sta*"*tutes of Bankrupts*."—True: But the Conſtruction of *thoſe* Acts, made for the Benefit of the Bankrupt's Creditors, is very different from the Conſtruction of this *prohibitory* and *penal* Act; which ought to receive a *ſtrict* Conſtruction, in Point of extending the *Penalty*.

Therefore, for theſe Reaſons, and thoſe given by the Lord Ch. Juſt. He held "That this was *not* an *exerciſing* the "Trade *within the Act*."

Mr.

Mr. Juſt. *Foſter* concurred; and ſaid, He had prepared Himſelf to give his Reaſons *at large*: But as the Lord Chief Juſtice had gone through them ſo fully, and inforced them in ſo clear and ſatisfactory a Manner, He would only, *in general*, declare his Concurrence.

Mr. Juſtice *Wilmot* was of the ſame Opinion.

By the Court unanimouſly Judgment was given for the Defendant.

REGULA GENERALIS.

THE Court declared, That all *enlarged Rules* to ſhew Cauſe, which were made in the laſt Term, ſhould be moved *before the laſt Week* of the preſent Term; *Unleſs Leave* for poſtponing them ſhould be particularly applied for, and granted: And this Rule to prevail hereafter, in all future Terms, in the ſame Manner.

Monday 15th *November* 1756. Lord *Mansfield* took the Oaths: He was (as is uſual) ſworn firſt and *alone*.

Roades *verſus* Barnes.

Tueſday 16th *November* 1756.

THIS was a Plea of a *ſtated Account*, pleaded to an Action upon *Simple Contract*; To which Plea there was a bad Replication, and a Demurrer to that Replication: Conſequently, the Queſtion was only upon the Validity of the *Plea*.

After a long Argument for the Defendant in ſupport of the Plea, The Court, without hearing the other Side, held the Plea *bad in Subſtance*: And ſo they ſaid, it had been determined in this Court, laſt *Hilary* Term, in a Caſe of *Atherly* v. *Evans*. A promiſſory *Note* cannot be pleaded in Bar to an Action upon Simple Contract: Though a *Bond* may, becauſe it extinguiſhes the Debt. One Bond cannot be pleaded to an Action brought upon another Bond.

Judgment for the Plaintiff.

Rex

Wedneſday 17th November 1756.

Rex *verſ.* Fonſeca.

MR. *Norton*, on Behalf of the Proſecutor, ſhewed Cauſe againſt diſcharging the Defendant's Recognizance.

This was a Recognizance entered into by the *Defendant* and two other Perſons, upon his removing this Indictment (which was for an aſſault with intent to raviſh) from *Hicks's Hall*, where it was originally found.

The Defendant had been tried, confined, and fined in this Court; and had paid his Fine.

After which, Mr. *Morton* had moved to diſcharge the Defendant's Recognizance; it being a Recognizance at *Common Law*, and all the Terms of it having been complied with. For he inſiſted,

1ſt, That it is not within the Statute of 5 & 6 *W. & M. c.* 11. *ſ.* 2. being from the Court of *Oyer and Terminer*, not from the Seſſions: And this Statute relates only to Indictments found *at the Seſſions*.

2dly, That the *Principal* is here bound, as well as the Securities: Therefore alſo, it is not within the ſaid Act: which requires only Two Manucaptors, *without* the Principal.

3dly, The *Sum* is alſo different: For it is not a Recognizance in 20l. but in 100l. Himſelf, and each Security 50l. Therefore for this Reaſon too, it is not within the ſaid Act. In Proof of which he cited 2 *Salk.* 564. *Regina* v. *Ewer*; where a *Scire facias* was brought on a Recognizance taken before a Judge, upon granting a *Certiorari* to remove an Indictment from the Seſſions of the Peace, in the Sum of 40l. whereas the Sum preſcribed by the Statute, is 20l. And Lord Ch. J. *Holt*, held this Recognizance to be good at Common Law; but not to be a Recognizance according to this Statute.

M. 15 *G.* 2. *B. R. Rex* v. *Sidney*, was alſo cited and relied upon by Him, as in Point to the preſent Caſe.

In anſwer to which, Mr. *Norton* urged,

1ſt, That the Court at *Hicks's Hall* is both a Court of *Oyer and Terminer*, and ALSO a Court of *Quarter Seſſions*. And as to the

2d

2d and 3d Objections. The Defendant has availed himſelf of the Recognizance; and has, *upon* it, removed the Record: And therefore he ought to be bound by it, *as* by a proper Recognizance.

And *Sidney*'s Caſe was, He ſaid, upon different Circumſtances.

Here, he is not to depart the Court WITHOUT LEAVE: Therefore the Court will firſt oblige Him to do Us Juſtice, and pay the *Coſts*, in the ſame Manner *as if* the Recognizance had been *regularly* taken under this Act.

N. B. The Seſſions at *Hicks*'s *Hall* ſit in *both* Capacities, *viz.* of Seſſions of the Peace, and alſo of *Oyer and Terminer*, and they draw up their Orders with the *One* Title, *or* with the *other*, according to the DEGREE of the Offence; (*viz.* Common Aſſaults, and Offences of a low Nature, under the Title of a Court of *Seſſions*, and Aſſaults with Intent to raviſh, Riots, *&c.* and Offences of a high Nature, under the Title of a Court of *Oyer and Terminer:*) And the *Certiorari*'s are directed accordingly. And the preſent *Certiorari* was directed to them AS a Court of *Oyer and Terminer*.

The Court looked upon the Caſe of *Rex* v. *Sidney* to be in Point:

And accordingly, Mr. *Morton*'s Rule for diſcharging the Defendant's Recognizance, was made abſolute.†

†*V. Poſt, pa. Rex* v. *Lyon.* 13th *February*, 1764.

Macrow *verſ.* Hull.

THE Defendant's Council ſhewed Cauſe againſt the Court's granting a new Trial upon Payment of Coſts; which had been moved for, by the Plaintiff's Council, upon the Foot of the Verdict's being *againſt Evidence:* (Which Verdict was for the *Defendant*; and, conſequently, the Application to ſet it aſide, had been made on the Part of the Plaintiff.)

Mr. Juſt. *Foſter* (who tried the Cauſe) reported it to be an Action of Treſpaſs, *extremely frivolous*; but ſufficiently proved. He ſaid that the Defence was a very ſtrong One indeed, in *Mitigation of Damages*; but yet was NOT *a ſufficient Denial of the Treſpaſs:* ſo that, in Strictneſs, the Verdict was undoubtedly againſt Evidence. However, he thought the Action *ſo trifling, frivolous, and vexatious*, that he ſhould have thought Sixpence Damages to have been enough.

Whereupon

Whereupon The Court held, that NOTWITHSTANDING *its being a Verdict* AGAINST *Evidence*, (which in general is a good Reaſon for ſetting aſide a Verdict and granting a new Trial,) yet the Action appearing, in *this* Caſe, to be *frivolous*, *trifling*, and *vexatious*, and the REAL *Damages* little or none, they ought to refuſe, and accordingly did refuſe to ſet aſide the Verdict: And

Lord *Mansfield* added that it would even be a Cruelty to the Plaintiff, to grant his Motion; as he muſt pay the Coſts of the former Trial, if he ſhould prevail in it; and yet could hope for ſuch very ſmall Damages upon a new One.

Rule diſcharged. *Vide Poſt*, *pa.* 54. *Farewell* v. *Chaffey*, S. P. *accord*.

Thurſday, 18th *November*, 1756.

Harriſon Knt. Chamberlain of London *verſ.* Godman.

MR. Serjeant *Poole* and Mr. *Eliab Harvey* ſhewed Cauſe againſt the iſſuing of a *Procedendo* in this Cauſe.

It came into this Court, upon the Return of a *Habeas Corpus cum Cauſa*, directed to the Mayor, Aldermen, and Sheriffs of *London*, commanding them to bring up the Body of the Defendant, together with the Cauſe, *&c.*

The Return was to the following Effect, *viz.* That there is a Cuſtom in *London*, " that if any *antient Cuſtom*, *hard* " *and defective* in any Thing *newly ariſing*, wants amend- " ment, the Mayor and Aldermen, with the Conſent of " the Commonalty, have always, *&c. appointed fit Remedy*, " for the Common Good of the Citizens: So as ſuch their " Ordinances be conſonant to Faith and Reaſon, and in " no wiſe prejudicial to the King or his People, nor repug- " nant to the Laws or Statutes of *England*." And that the Cuſtoms of *London* are confirmed by Act of Parliament. 7 *R.* 2.

They then certify, that there is within the City of *London*, a Company of *Butchers*; and that at a Common Council holden on the 27th of *June*, 20 *G.* 2. the Lord Mayor, Aldermen and Common Council made an *Ordinance*, " That whereas many Perſons who *exerciſe the Trade of* " *Butchers*, have obtained *Freedoms of* OTHER *Companies*, " by Redemption or otherwiſe; by Reaſon whereof the " *Company of Butchers* is much *diminiſhed and fallen into* " *Decay*; For *Remedy* THEREOF, It is Ordained That every " Perſon, not being already free of the City, occupying, " uſing or exerciſing, or who ſhall occupy, uſe or *exerciſe* " *the Art, Trade or Myſtery of a Butcher* within the ſaid City " or

" or its Liberties, ſhall take upon Himſelf the Freedom of " the COMPANY *of Butchers* ; and that no Perſon now uſing, " or who ſhall hereafter uſe or *exerciſe the Trade of a Butch-* " *er* within the ſaid City or Liberties, ſhall be admitted " into the Freedom of the ſaid City, by the Chamberlain " thereof, *of or in any* OTHER *Company than* the ſaid Com- " pany of *Butchers* : Provided always That every Perſon " not being already free of the ſaid City, who are or ſhall " be *intitled to Freedom of any* OTHER *Company* by Pa- " trimony or Service, *ſhall be* ADMITTED *into* THIS *Com-* " *pany of Butchers*, upon Payment of a like Fine and Fees as " are uſually paid upon Admiſſion of a Child or Appren- " tice."

And that it was then and there further enacted, " That " if any Perſon or Perſons, (except ſuch as are already free, " &c.) ſhall *uſe the Trade of a Butcher*, not being free of THIS " *Company of Butchers*, He, &c. ſhall pay 5l." And Di- rections are given how the Penalty of 5l. ſhall be levied, and alſo concerning Coſts.

They then further certify " That the Defendant was " taken, on an Action brought againſt him in the Mayor's " Court of *London*, for the Penalty of this By-Law."

Upon this Return, Mr. *Williams*, on Behalf of the Plain- tiff in the Mayor's Court, had moved for a *Procedendo*.

Mr. Serjeant *Poole* and Mr. *Eliab Harvey*, of Counſel for the Defendant, objected to this By-Law, as being a bad one: And they principally relied on *the following Objection to it*, viz. " That it was a By-Law in RESTRAINT *of* " *Trade* ; and therefore could not be good, WITHOUT " ſetting forth a SPECIAL *and* PARTICULAR *Cuſtom* to ſup- " port it ;" Which is NOT *done* by the preſent Return. And they argued, that this By-Law is by no Means ſup- ported by the Authority which is ſet forth in the Return, as its Foundation ; *viz.* " A Cuſtom to apply fit Remedy " for the Common Good of the Citizens, where any an- " cient Cuſtom, hard and defective in any Thing *newly* " *ariſing*, wants Amendment ;" For *neither* is here any *ſuch ancient Cuſtom ſet forth*, and ſpecified, which wanted Amendment ; nor any Hardſhip or Defect ſtated ; *Nor* is there any Pretence to ſay that this is " a Matter *newly ari-* " *ſing* ;" *Nor* does the *Return ſo much as even alledge, either* that there was any ſuch ancient Cuſtom wanting Amendment, or any Hardſhip or Defect, or that the Subject of this By- Law was a Matter newly ariſen.

The Caſes adduced by each of them in Proof of their Poſi- tions, were as follow :

That it is a bad By-Law, and void, as being in RESTRAINT *of Trade*, appears by *Waganer's* Caſe, 8 *Co.* 125. *a. b.*

Therefore it is bad, without a Cuſtom to ſupport it. *Ibid.* in Point.

Yet NO *Cuſtom* is here *returned*, for Support of any *Reſtraint of Trade* at all: And therefore the Court *cannot take Notice* that there *is* any ſuch Cuſtom. 2 *Strange* 1187, *Sir John Hartop* v. *Hoare & al'*. The Court could not *judicially* take Notice, "that every Shop in *London* is a Market "Overt;" that Cuſtom *not* being *found nor ſtated*. 1 *Strange* 187. *Argyl* v. *Hunt* (there cited) is in Point, to the ſame purport. 5 *Mod.* 108. *Robinſon* v. *Groſcourt* is in Point with the preſent Caſe. *Carthew* 75. *Watſon* v. *Clerke*. The Court cannot, *ex Officio*, take Notice of the Cuſtoms of *London*. *Salk.* 125. *Hodges* v. *Steward*, the fourth Reſolution, is very ſtrong to the ſame Purport. And *Co. Lit.* 175. *b.* proves the ſame Poſition.

Now here, though the *general* Cuſtom "to make By-"Laws," is ſet out; yet, the *particular* Cuſtom "to make "*ſuch* a By-Law as *this* is, in Reſtraint of Trade," is NOT ſet out.

As to the Caſe of *Wannel* v. *Camerar' Civit' London*, in 1 *Strange* 675. There the particular Cuſtom *was* ſet forth, as appears upon ſearching the Record of that Caſe: (Though it has been called, AS cited from Sir *J. S.* a Caſe in Point.) In Sir *T. Raym.* 289. *Player* v. *Vere*. The By-Law made for the better and more regular Ordering of Cars and Carts, was holden to be good: But in 1 *Ro. Abr.* 364. *pl.* 5. *(inter Payne* v. *Hawghton)* a By-Law for reſtraining the Liberty of the Trade of a Carman, was holden *bad*.

Mr. *Williams* and Mr. *Norton*, on the other Side, argued for the *Procedendo*, and conſequently for the Validity of the By-Law.

This, they ſaid, is *not* a By-Law *in* RESTRAINT *of Trade*: 'Tis only in *Regulation* of it. And the *Court* WILL *take* NOTICE of the Cuſtom of *London*, "That no Man can exerciſe "a Trade in *London*, without being *free* of the City, and of "ſome Company of it." 2 *Stowe*, *B.* 4. *c.* 9.

We have returned a Cuſtom, "That we have Power to "alter and amend any ancient Cuſtom, and to appoint fit Re-"medy for the Common Good of the Citizens, *where* there "is Hardſhip or Defect in it."

1 *Strange* 675, is this very Caſe, in the Joiners Company: And there is *no* Return there mentioned or hinted at, of any

particular Cuſtom; though it is indeed returned "That by "the Cuſtom, no Perſon can be free of the City, without "being free of *One* of the Companies."

In 5 *Co.* 62. *Chamberlain de Londres* Caſe, The By-Law about bringing Broad-Cloths to *Blackwell-hall* to be ſearched, *&c.* was held a good By-Law: And yet there is no particular Cuſtom ſet forth, on which to found the By-Law.

In 2 *Rol. Abr.* Tit. *By-Laws*, *pa.* 365. *pl.* 9. "That "none ſhall make, or uſe a Hot-Preſs in *London*."——There is no particular Cuſtom, on which the By-Law is founded: Yet it was holden a good By-Law.

8 *Co.* 126. *a. Waganer*'s Caſe, and alſo Sir *T. Raym.* 288. *Player* v. *Vere*, prove that Cuſtoms in *London* may *partially* reſtrain Trade.

They admitted that a particular Cuſtom impowering them to make *this particular* By-Law, is *not* minutely ſet out: But at the ſame Time inſiſted, that they had ſet forth *enough* of a particular Cuſtom, to warrant this By-Law. For, it is ſet forth, "That if any ancient Cuſtom, "hard or defective, *&c.* wants Amendment, the Mayor "and Aldermen with the Conſent of the Commonalty, "have by Cuſtom a *Power* of appointing *fit Remedy* for the "Common Good of the Citizens: So as, *&c.*" Which is a *general* Power of making By-Laws by Cuſtom: And this Power, confirmed too by Act of Parliament.

Now the preſent By-Law falls within the Proviſion of this *general* Power.

The Subſtance of this By-Law is, "That no Butcher by "Trade, though free of the City, ſhall exerciſe this Trade in "the City, without being free of the Butchers Company." And it was both a *Hardſhip* and *Defect*, that they *might do ſo, previouſly* to this By-Law.

Here is a Cuſtom ſhewn, "to *reſtrain* ALL *grown or* "*growing Evils*, within the City:" Which *is* a Cuſtom *to reſtrain Trade*. And there are Hundreds of By-Laws in *London*, founded upon this *general* Power.

And *Wannell*'s Caſe, is, in Subſtance, *in Point*: It is a general Return of an Authority to make By-Laws under their *general* Power; and the ſame Sort of By-Law with the preſent one, is eſtabliſhed as a *good* One.

Lord *Mansfield:* I ſuppoſe it is a *Slip* in the Return.

I don't take the Objection to be "that it is neceſſary that "it muſt be a particular Cuſtom to make a *particular* By-"Law:" But that there is *no general* Power here ſhewn, under the Cuſtom, to lay ſuch a Reſtraint upon Trade."

This By-Law *is* a *Reſtraint* of Trade; and *not a* MERE *Regulation of it:* The Preamble *don't pretend* it to be made to regulate the Trade; but *merely* for the *Benefit of the Butchers Company.* It is founded upon the *general* Power of making By-Laws in the City of *London.*

Now under a GENERAL *Power to make By-Laws*, it is certain, that a By-Law cannot be made "*to* RESTRAIN "*Trade.*"

And by the general Cuſtom of *London*, *every* Freeman may exerciſe *any* Trade, *without* being free of a *particular Company:* Which this By-Law requires Him to be.

The Caſe in 1 *Strange* 675. *Wannell*'s Caſe, is not a full State of the Pleadings. But it appears that the Return ſtated "that no Perſon could be a Freeman of the City, "till he was a Member of one of the Fraternities;" then ſtated a Power to make By-Laws (but *how* that Power was ſet out, don't appear:) Then the By-Law itſelf is there ſet out; which profeſſes to be a *Regulation* of Trade, and recites "that ſeveral Perſons not free of the Joiners "Company had exerciſed the Trade of a Joiner in an *un*-"*ſkilful* and *fraudulent* Manner, which could not be re-"dreſſed whilſt ſuch Perſons were not under the Orders "and Regulations of the Company;" and *therefore* it enacts that no Perſon ſhall uſe that Trade, who is not free of the Company.

The By-Law for ordering and diſpoſing of Carts and Cars, in Sir *Tho. Raym.* 288, 289. is a *mere Regulation* of Trade.

And as this Power to make By-Laws to *reſtrain* Trade, is NOT *ſet out*, in the preſent Caſe, We *cannot preſume* it, from any printed Book, or any other way whatſoever. We cannot take *judicial* Notice of any *particular* Cuſtom ſupporting ſuch a By-Law as this; when no ſuch particular Cuſtom is ſet out: And it certainly is not good under the *general* Power, which *is* ſet out.

Mr. Juſt. *Deniſon* concurred, that the Court could not take *judicial Notice* of any ſuch particular Cuſtom to warrant this By-Law, without its being *ſet out.*

And the Cuſtom here ſet out, of a Power " to mend any " hard or defective Cuſtoms," is *not ſufficient:* For here is *no* hard or defective Cuſtom particularly ſet out. And every Man, free of the City, had a Right to ſet up any Trade: Which original Right is here taken away by this By-Law.

Indeed they may make By-Laws to *regulate* Trade; but *not* to *reſtrain* it, unleſs they have a particular Cuſtom to ſupport ſuch By-Laws. As to the Caſe of the ordering and diſpoſing of Carts, Cars, Carters and Carmen, in *Raym.* 288. *Player* v. *Vere*, *That* was a By-Law for Regulation of Trade, and Prevention of Nuſances in the Streets and Lanes: But *this* is a By-Law to RESTRAIN Trade, not warranted by any particular Cuſtom. Therefore he held it bad.

Mr. Juſt. *Foſter* concurred; and ſpoke to the ſame effect.

Mr. Juſt. *Wilmot* expreſſed Himſelf to the ſame Purport.

By the Court unanimouſly, The By-Law was holden a *bad* One: And the Rule for ſhewing Cauſe " why a *proce-* " *dendo* ſhould not go," was diſcharged.

Rex *verſ.* Killinghall.

MR. Serjeant *Poole* and Mr. *Clayton* ſhewed Cauſe againſt a Rule which had been moved for by Mr. *Norton*, " to quaſh a Preſentment or Inquiſition found by " the *Grand Jury* of the County of *York*, at the general " Seſſions of *Oyer and Terminer*, for that County:" Which Mr. *Norton* objected to, as being *coram non Judice*; For, he ſaid, the Grand Jury had no Authority to make ſuch a Preſentment, or find ſuch an Inquiſition, *under their* GENERAL *Charge* from the Judge of Aſſize; whatever might be the Caſe if the Judge had *particularly* directed and preſided over an Inquiſition of this kind, upon the Neglect of the Coroner.

The Fact found, was " That the Mare of *John Killinghall*, " Eſq; was the Cauſe of the Death of one *William Stelling*; " and was of the value of 10l."

It happened that the Coroner had not taken any Inquiſition at all, upon this Death: So that the Lord of the Manor, finding Himſelf likely to loſe his Deodand, had made this Application at the Aſſizes; where the Grand Jury found this Inquiſition or Preſentment; which was afterwards removed hither, by *Certiorari*.

Mr. Serjeant *Poole* and Mr. *Clayton* endeavoured to ſupport it.

This

This Inquiſition, they ſaid, before a Grand Jury is *traverſable*, (which a *Coroner*'s Inquiſition is *not*;) and therefore does No Body any Injury. And as the Coroner had *taken none*, at all, upon the preſent Occaſion, *this Method* was *neceſſary* to be taken, in order to come at the Deodand.

1 *H. H. P. C.* 419. *c.* 32. Of Deodands, ſhews moſt expreſsly that this may be done, before Commiſſioners of Gaol Delivery, *Oyer and Terminer*, or of the Peace, if omitted by the Coroner. So does 1 *H. P. C.* 414. in treating of Inquiſitions; where *Laughton*'s Caſe, *H.* 37 *Eliz.* is cited; and it is ſaid to be "inquiſible before the Juſtices of *Oyer and Ter-*" *miner*; yea, or of the Peace;" and that it had been adjudged accordingly, *M.* 1656. in *Greeve*'s Caſe.

3 *Inſt.* 55. *c.* 8. *Note b. in Margine*, makes a Difference between Inquiſitions taken before the Coroners, and Inquiſitions taken before Juſtices of the Peace, as to having a Traverſe.

2 *Ro. Abr.* 96. *pl.* 3. proves that an Indictment may be taken before Juſtices of Peace, and of *Oyer and Terminer*.

2 *Lev.* 140. *Rex* v. *Parker* is in Point, "that the Coroner's "Omiſſion may be ſupplied by Commiſſion of Inquiry; or "the Juſtices of Peace, or of Aſſize may inquire of it, with-"out Commiſſion."

2 *H. H. P. C.* 58. *cap.* 8. concerning the Coroner and his Court, and his Authority in Pleas of the Crown, proves that Grand Juries have this Juriſdiction in Caſe the Coroner neglects it.

2 *H. H. P. C.* 59. *Ad idem.* It is there ſaid "that Juſtices "of the Peace, or *Oyer and Terminer*, or of the King's Bench "may inquire, if the Coroner do not: But that THAT Preſent-"ment is traverſable; which the Preſentment of the Coro-"ner of a *Felo de ſe*, is *not*."

Upon theſe Authorities, they ſaid, my Lord *Falconbridge* (the Lord of the Manor) was adviſed to take this Method: But the Judge of Aſſize (Mr. Juſt. *Birch*) declined to meddle with it, or to have the Inquiſition taken before him *particularly*, or to give any *particular* Direction about it.

They added theſe Caſes alſo, 1 *Ventr.* 352. in the Note at Bottom. *Poph.* 209. *Anon'*: and S. C. (apparently,) in *Noy* 87. "It *may* be done *before Juſtices of Peace*." 1 *Ventr.* 181, 182. *Stanlack*'s Caſe. "If a Coroner omits to in-"quire,

" quire, this Court may do it, as ſupreme Coroner of *Eng-*
" *land*; or may make Commiſſioners to inquire: Or
" Commiſſioners of *Oyer and Terminer* may inquire. But
" then it is not *ſuper viſum Corporis*; and therefore may be
" traverſed."

Mr. *Norton contra.*

This is a Preſentment *ex parte*; and a Preſentment of *in-titling*, in order to found an *odious and ſuperſtitious* Claim; and *all tranſacted in* SECRET.

The Caſes cited only prove, " That, in Default of the
" Coroner's having inquired, the Juſtices of *Oyer and Termi-*
" *ner*, and of the Peace, may make the Inquiry; and that it is
" traverſable."

They ſay " That we could not have traverſed the *Coro-*
" *ner's* Inquiſition;" (Which, however, I *deny*:) " But
" this we may traverſe; and therefore can't be injured
" by it."

But will it be ſaid " that the *putting* a Man to a Traverſe,
" is *no Injury*?"

4 *Inſt.* 196, 197, 198. enters largely into the Subject of Traverſes; and condemns ſecret Inqueſts and Offices.

Now this is an Office of Intitling; and therefore ought to be *publickly and openly* found.

Lord *Mansfield*: By expreſs Statutes.

And I remember a Caſe of the late Duke of *Buckingham*'s Heirs; where, upon Application to the Court of Exchequer, Notice was directed to be given; Though, in general, *Notice* is *not* neceſſary.

Therefore I think *this* Inquiſition can't be ſupported.

And Inquiſitions before the Coroner *are* traverſable. [*V.* 2 *H. H. P. C.* 416. where that Author declares his own Opinion accordingly.]

Mr. Juſt. *Deniſon*: I think it cannot be ſupported.

Mr. Juſt. *Foſter*: I am of the ſame Opinion.

Rule to quaſh the Preſentment made abſolute.

Friday

Friday 19th *Novemb.* 1756.

MEMORANDUM, On this Day, The GREAT SEAL was put into COMMISSION; being delivered by his Majeſty (immediately upon the Earl of HARDWICKE's Reſignation of it,) to Sir JOHN WILLES Lord Ch. J. of the Common Pleas, SIR SIDNEY STAFFORD SMYTHE third Baron of the Exchequer, and SIR JOHN EARDLEY WILMOT youngeſt Judge of this Court: Which prevented Mr. Juſtice WILMOT from ſitting much in *this* Court, during the Remainder of the preſent Term and the Whole of the Two ſubſequent Terms.

Oppenhein qui tam *verſ.* Harriſon.

Saturday 20th November 1756.

THE Proceedings were ſet aſide for Irregularity in the want of an *Attorney's Name* being duly ſet to them: It appearing that although they had the Name of a regular Attorney, *in Fact*, ſet to them; yet it was ſo ſet, WITHOUT *any Authority from Him.*

And the Court alſo granted an *Attachment* againſt one *Habin*, who acted as Attorney for the Plaintiff, and had ſo put Mr. *Granger's* Name (an Attorney of this Court) *without* Authority or Leave from Mr. *Granger.*

Cooper and another, Aſſignees of William Johns a Bankrupt, *verſ.* Chitty and Blackiſton, Eſqrs. Sheriffs of London. *Hil.* 27 *G.* 2. *Rot.* 869.

Tueſday 23d November 1756.

THIS Cauſe was twice argued: It came firſt before the Court, on *Monday* 9th *June* 1755; and again, upon *Tueſday* the 16th Inſtant. It was an Action of Trover brought by the Aſſignees of *William Johns*, a Bankrupt, AGAINST *the* SHERIFFS of *London*, who had taken *and ſold* the Goods of *Johns* in Execution under a *Fieri facias* which had iſſued againſt *Johns*, at the Suit of one *William Godfrey.*

On the Trial, a ſpecial Caſe was ſettled:

Which Caſe ſtates, That *Johns* was regularly *declared a Bankrupt* on the 8th of *Decemb.* 1753. And as to the Reſt, the following Times and Facts were ſtated; *viz.* That on the 5th of *December* 1753, one *Godfrey* obtained Judgment in the Common Pleas, againſt the ſaid *Johns*; and on the ſame Day (5th *December* 1753) *Execution* upon the ſaid Judgment

Judgment was taken out againſt Him by *Godfrey*, and the *Goods ſeized* by the Sheriffs, under it; That *Johns* committed the Act of Bankruptcy 4th *December* 1753, and on the 8th of the ſame *December*, a Commiſſion of Bankruptcy was taken out againſt Him; and on the very *ſame Day*, the Commiſſioners of Bankruptcy *executed an* ASSIGNMENT; and afterwards, *viz.* on the 28th of *December*, a *Bill of Sale* of the Goods was made, by the Sheriffs. The Plaintiffs are the Aſſignees under the Commiſſion: The Defendants are the Sheriffs of *London*, who ſeized the Goods under the Execution.

The Point was, Whether the Aſſignees under the Commiſſion of Bankruptcy can maintain an Action of Trover, againſt the SHERIFFS (who executed this Proceſs under a regular Judgment and Execution;) for *ſeizing* the Goods, under a *Fieri facias* iſſued and executed *after* the Act of Bankruptcy was committed; and *ſelling* them, *after* the Aſſignment was executed.

The Counſel, who argued for the Plaintiffs, made two Queſtions, *viz.* Argument for the Plaintiffs,

1ſt, WHOSE *Property* the Goods were, *when ſeized* by the Sheriffs, by Virtue of this *Fieri facias*;

2dly, *Whoſe* Property they were, *when* SOLD by the Sheriffs.

1ſt Queſtion. *After* the *Act* of Bankruptcy, they ceaſed to be the Property of the *Bankrupt Himſelf*, they ſaid; whereſoever elſe, the Property might be, between the Act of Bankruptcy and the Aſſignment.

This *Relation* to the Act of Bankruptcy is like that of *Adminiſtration* to the Time of the Death: And they cited *Kiggil* v. *Player*, 1 *Salk.* 111. as S. P. with the preſent Caſe, exactly.

The utmoſt that the Bankrupt Himſelf could be pretended to have, was a ſpecial Property, *defeaſible* by the Aſſignment. It is like the Caſe of a Diſtreſs for Rent; where the Seizor may ſell the Diſtreſs, after 5 Days; but if the Money be paid within the 5 Days, he can't ſell: So that in the *Interim*, the Right is defeaſible.

Here, the Plaintiffs have declared as Aſſignees under the Commiſſion of Bankruptcy: Therefore their Intereſt *veſts* as *from the Time of the* ACT *of Bankruptcy*.

If the Bankrupt *Himſelf* had delivered the Goods to a Stranger, it had been the ſame Thing: The Stranger would be anſwerable to the Aſſignees.

Sheriffs

Sheriffs execute Proceſs *at their Peril:* They are anſwerable *civiliter*, for what they do upon it. 11 *H.* 4. 90. 13 *H.* 4. 25.

A Man may without his own fault, be poſſeſſed of a Horſe which has been ſtolen: But nevertheleſs he is anſwerable, *civiliter*, to the true Owner, for it.

The Sheriff had no Authority to take any Goods in Execution, *but* the Goods of the *Defendant:* If he does take any *other* Goods, he is a Treſpaſſer.

In Writs of Execution, it is at their Peril, if they take *another* Man's Goods. In *Carthew* 381. *Hallett* v. *Byrt*, 'Tis ſo laid down by Ch. J. *Holt*, expreſsly.

Now theſe were Goods of the Aſſignees. And they may maintain an Action, *either* againſt the *Plaintiff* in the Cauſe, *or* the *Sheriff*, OR the *Vendee* of the Goods: And the Sheriff is the *Propereſt* Perſon, againſt whom to bring the Action.

The *Giſt* of an Action of Trover is the CONVERSION: The *Finding* is not the material Part.

And they cited ſeveral *Niſi prius* Caſes, of Actions brought by Aſſignees of Bankrupts: *Viz.*

M. 11 *G.* 1. Trover by *Vanderhagen & al.* Aſſignees of *Daniel*, a Bankrupt, *v. Rewiſe*, a Serjeant at Mace of the City of *London*; S. P. with the preſent. Lord Ch. J. *Pratt* held the Action maintainable.

The S. P. was alſo before Lord Ch. Juſt. *Lee*, in a Caſe of *Bloxholm*, Aſſignee of *Mills* a Bankrupt, v. *Oldham & al.* at the Sittings after *Tr.* 1750. at *Guildhall:* In Trover againſt a Sheriff, and the former Plaintiff, and the Vendee, (all of them together.) It was objected "That the *Sheriff* "ought to be acquitted:" But over-ruled; and Verdict againſt *all three.*

The Seizure there was *before* the *Commiſſion*, but AFTER *the* ACT of Bankruptcy.

The ſecond Queſtion is, "*Whoſe* the Goods were, *at the* "TIME OF THE SALE." The Writ only commands the Sheriff, "to ſell the DEFENDANT's Goods:" And if he ſells the Goods of *another* Perſon, it is a CONVERSION.

It

It is beyond Doubt, that the Aſſignment has *Relation to the Act of* Bankruptcy: And the Aſſignees ſtand in the Bankrupt's Place, *from that Time.* 1 *Ventr.* 193. *Monk* v. *Morris and Clayton* proves this.

Here then the *Aſſignees* had *all* the Property that the *Bankrupt had, at the Time of his Act* of Bankruptcy. Conſequently, the *abſolute Dominion* was in *them:* And the Sheriff could not, AFTER ſuch Aſſignment, *ſell* them, *as* the Defendant's. Indeed Sheriffs ſeldom do, *in Fact*, ſell the Goods, without Indemnity. But the Sheriff has here *committed an Error*, in ſelling them *at all:* For they were *not* the Defendant's. He might, it is true, have ſummoned a Jury to inquire "*Whoſe* Goods they were." But ſtill, even their Verdict cannot affect the Right of the *true* Owner of the Goods.

The Point about *Relation* backwards, does not at all affect the Queſtion, *as to the* SALE. For the Aſſignment was *prior* to the SALE, though not to the *Seizure.*

And they affirmed that the Sheriff not only might, but even ought, in this Caſe, to have returned "*Nulla Bona:*" *That* would have been the proper, and the true Return. And if it had been diſputed, he then might have *brought the Money into Court.* There is a Caſe, of *Rex v. Brein* Bailiff of the *Savoy*, 1 *Keb.* 901. where the Goods were claimed under a Bill of Sale; the Sheriff returned "*Nulla Bona*; and the Money was ordered to be brought into Court by the Sheriff; and the Return to be made agreeable to the Event of a Trial of the Validity of the pretended Bill of Sale, after ſuch Validity ſhould be tried in an Action.

In the preſent Caſe, the Defendants *knew* of the Aſſignment, BEFORE *they* SOLD *the Goods*; whatever they might do, when they *ſeiſed* them. And they could not poſſibly be *obliged* to ſell them: It is contrary to an expreſs Act of Parliament, which veſts the *Property in the Aſſignees.* So that here the Sheriff has ſold the Goods, not of the Bankrupt, but of the *Aſſignees.*

And ſuppoſing that the Plaintiffs may bring an Action againſt the Plaintiff in the original Action, OR againſt the Vendee of the Goods; yet they ſeem, both of 'em, to have better Excuſes than the *Sheriff* has; and are more innocent. Therefore why ſhould the Aſſignees be turned round to *them*, when they can undoubtedly maintain either Treſpaſs or Trover againſt the Sheriffs, who have *ſold* the Goods; which is a Converſion, and will ſupport an Action of Trover? That the Plaintiffs have this Election, to bring either

Treſpaſs

Treſpaſs or Trover, appears from *Cro. Eliz.* 824. *Biſhop* v. *Lady Montague*, and *Cro. Jac.* 50. S. C.

Therefore they concluded that the Action was well brought.

Argument for the Defendants.

The Counſel who argued for the Defendants, the Sheriffs, agreed that the Matter would turn upon the Solution of the two Queſtions made by the other Side.

As to the firſt Queſtion, They ſaid it would be very hard, if this Action ſhould lie AGAINST *the* SHERIFFS; and *they* be put to controvert the Act of Bankruptcy, which is a Matter not at all within their Knowledge.

They argued that the Sheriffs ſhall not be conſidered as WRONG *Doers:* And to prove it, cited 1 *Lev.* 95. *Turner* v. *Felgate.* *Raym.* 73. S. C. 2 *Siderf.* 126. S. C. and 1 *Keble* 822. S. C. 1 *Lev.* 173. *Baily* v. *Bunning.* 1 *Siderf.* 271. S. C. and 2 *Keble* 32, 33. S. C.

The only Acts of the Sheriffs that can be conſidered as a *Converſion*, are the Acts of *Seizure* and *Sale.*

Now they were compellable by the Writ of *Fieri facias* to *ſeize* the Goods and *levy* the Debt.

For TILL *the Commiſſion and Aſſignment*, the *Property was in the Bankrupt:* And it did *not appear* that a Commiſſion EVER WOULD *be taken out.*

1 *Salk.* 108. *Cary* v. *Criſp*, is expreſs in Point, "that the "Property is in the Bankrupt, *till* Aſſignment." It was there reſolved that the Property of the Goods is *not* transferred out of the Bankrupt, *till* Aſſignment. 2 *Str.* 981. *Braſſey & al'* v. *Dawſon & al' accord'.*

1 *Lev.* 173. *Baily* v. *Bunning.* Judgment was for the Officer; He being obliged to execute the Writ; and could not know of the Act of Bankruptcy, or that any Commiſſion would ever be ſued: And the Sheriff was holden not to be liable, although he had Notice of the Aſſignment.

1 *Siderf.* 272. S. C. The *Taking* was holden lawful.

Comberb. 123. *Lechmere* v. *Thorowgood.* The Officer ſhall not be made a Treſpaſſer, by Relation. 3 *Mod.* 236. S. C. 1 *Shower* 12. S. C.

The

The *Commiſſion* of Bankruptcy makes no Alteration, TILL *Aſſignment:* And AFTER *Aſſignment*, there ſhall be a *Relation*, ſo far as to avoid all meſne Acts of the Bankrupt, and *even to over-reach this Judgment*-Creditor. Thus far, they admitted.

But they inſiſted that the Action *ought not* to have been brought againſt the SHERIFF.

The Sheriff if to *ſeize*, *ſell*, and *return his Writ*. In Proof of this, they cited 2 *Ld. Raym.* 1072, 1074. *Clerk* v. *Withers*. 1 *Salk.* 322, 323. S. C. (3d Point.) 6 *Mod.* 293, 299. S. C. 1 *Siderf.* 29. *Harriſon* v. *Bowden*. *Cro. Eliz.* 235. *Mounteney* v. *Andrews*. 1 *Ro. Abr. Execution* 893. Letter B. *pl.* 2. *Dyer* 98. *b.* and 99. *a.* §. 57. and the two Caſes there cited in the Margin. And *Cro. Eliz.* 597. *Charter* v. *Peeter*. From all which Caſes, it appears that the SHERIFF is not liable to be moleſted.

1 *Salk.* 321. *Kingſdale* v. *Mann* proves that the *Seizure* is the *Eſſential* Part of the Execution: And an Execution is an *entire* Thing; and *cannot be ſtopped*, after it is once begun. 2 *Show.* 79. *Cockram* v. *Welbye*.

And after the Sheriff had ſeized theſe Goods, the original Plaintiff, *(William Godfrey)* could oblige the Sheriff to return his Writ: And yet, upon the Principles advanced, the Sheriff muſt be put under the greateſt Hardſhips. And he had NO METHOD *to make the Aſſignees* of the Bankruptcy to give him any *Aſſiſtance towards proving* the Act of Bankruptcy.

Indeed the Execution is *good*, though the Writ be *never* returned. 5 *Rep.* 90. *a. Hoe*'s Caſe: (1ſt Reſolution.)

The only Return the Sheriff could make muſt be, " That " he *had levied* the Money:" (which could only be by Sale.) Therefore he was OBLIGED *to ſell*. Conſequently the Law will not make him a Wrong-doer, *by* ſelling.

The following Caſes, they ſaid, were in Point for them; *viz.* 1 *Lev.* 173. *Baily* v. *Bunning*. 2 *Keble* 32, 33. S. C. 1 *Siderf.* 271. S. C. 3 *Lev.* 191. *Philips* v. *Thompſon*. 1 *Show.* 12. *Lechmere & al*' v. *Thorowgood & al*'. *Comb.* 123. S. C. 3 *Mod.* 236. S. C. and *Cole* v. *Davies & al*'. 1 *Ld. Raym.* 724. *per Holt* in Point, as againſt the Sheriff, moſt expreſsly.

And the preſent Plaintiffs may have an *adequate and complete Remedy*, againſt the *Plaintiff* in the original Action.

As

As to the Caſes cited, The Gentlemen who have argued on the other Side, put it upon the Queſtion, " Who had the " *Property* of the Goods."

Now the Property was in the *Bankrupt, at the* TIME of the Execution: It was NOT *in Abeyance*; as it is in the Caſe of an Adminiſtration. (Which is an Anſwer to the Caſe of *Kiggil* v. *Player*.)

The Sheriff is not in the Caſe of a *Stranger*. For he was OBLIGED *to execute and return* the Writ.

Indeed the Sheriff is to execute the Writ at his Peril; and *Carthew* 381. is ſo: The Reaſon is, becauſe the Sheriff may impanel a Jury, to inquire " whoſe the Goods are." But here, there were *no* Means for the Sheriff to indemnify himſelf: The Goods were undoubtedly THEN the Goods of *William Johns*; even though he had then committed an Act of Bankruptcy.

The Aſſignees have not a Right to recover the SPECIFIC Goods; but *only Damages*.

Treſpaſs will lie againſt the *Plaintiff* in the original Action, even *before* he receives the Money: though *Trover* indeed would not, *till* AFTER.

It is not certain that an Action will lie againſt the *Vendee* of the Sheriff.

As to *Vanderhagen*'s Caſe, it is not ſufficiently clear, how it was; or why it was determined.

But as to the Caſe of *Bloxham* v. *Oldham*, Mr. *Henley* did not † inſiſt on the Objection, " That the Action would not " lie *againſt* the Sheriff;" becauſe it would *not help* his Client: For in that Caſe, the Sheriff, and the Plaintiff in the Original Action, were *Both* of them Defendants. And the Caſe of 1 *Leo*. 173. was not indeed by Lord Ch. J. *Lee*, thought appoſite to that Caſe: But it was *not* over-ruled by Him. And the Goods were certainly the Goods of the Bankrupt, *till* Aſſignment.

† *N. B.* Mr. *Hume*, who was Counſel for the Defendant in that Caſe of *Bloxham* v. *Oldham*, agreed, " That the " Objection againſt the Sheriff's being a Defendant," was NOT *inſiſted upon*; becauſe the Plaintiff in the Original Action (who was alſo a Co-Defendant with the Sheriff there) had *indemnified the Sheriff*: So that it

it was, really, a Point quite *immaterial* to the Plaintiff; (who was at *All* Events liable to the Action.)

They added, that this was a Point of great Conſequence to all Sheriffs and Officers: On the other Hand, Creditors cannot be injured, though Sheriffs ſhould be excuſable, and the Original Plaintiff *only* ſhould be liable to the Action.

As to what has been ſaid of *Security* taken by the Sheriff. —The Court can take no Notice of a Sheriff's taking Security; nor can they ſuppoſe Him conuſant of a *private* unknown Act of Bankruptcy: And it would be very hard if an innocent Officer ſhould be hurt by *Retroſpection* and *Relation*.

They agreed that this Execution may be avoided, as *againſt the Original Plaintiff*: 2 *Strange* 981. *Braſſey & al.* v. *Dawſon & al.* is a Proof "that it may." But they denied it, *as* to rendering the *Officer* liable to an Action: For *He* is excuſable; as appears from the Caſes before cited.

As to the ſecond Queſtion.—The Foundation of this Action of Trover, is *Property in the Plaintiff*, at the *Time* of the Seiſure; and a *Tortious and Illegal Act* of *Converſion*: For without *both* theſe Circumſtances, *this* Action will not lie.

Now the PROPERTY *is in the* BANKRUPT, TILL *Aſſignment*: And the *ſubſequent Sale* cannot make the Sheriff a Wrong-doer, by a *fictitious Relation*. *Raym.* 161. *Bilton* v. *Johnſon & al*. "The Relation of a Teſte ſhall not juſtify a Tort."

It is ſaid that "this Relation is given *by Act of Parliament*." But there are no Words in the Act of Parliament that can make the Sheriff a *Wrong-doer*.

IF *the ſeiſure* was lawful, the *Sale* was ſo too. 2 *Ld. Raym.* 1074, 1076. *Clerk* v. *Withers*. *Cro. Jac.* 515. *Sly* v. *Finch*. *Cro. Eliz.* 440. *Boucher* v. *Wiſeman*. *March* 13. *Parkinſon* v. *Colliford & al' Executors of a Sheriff*. *Cro. Car.* 539. S. C. 1 *Jones* 430. S. C. *Hob.* 206. *Speake* v. *Richards*. *Cro. Eliz.* 237. *Mounteney* v. *Andrews*. The Law conſiders the *whole Execution*, as one *entire* Act: The intermediate Days are only allowed for the Sake of the Sheriff. Conſequently, He may execute the Whole *at once:* He may ſeiſe, and ſell directly. The Execution is an *entire* Thing; and can *not be ſtopped*. *Cro. Eliz.* 597. *Charter* v. *Peeter*. 6 *Mod.* 293. *Clerk* v. *Withers*. Therefore the *Officer* ſhall be protected.

Suppoſe

Suppoſe an *Action* ſhould be brought *againſt the Sheriff* for the *Money*. He might avail Himſelf perhaps by ſpecial Pleading; *provided* He was able to make out the Facts he ſhould ſpecially plead: But *how* could He be able to *prove* the Act of Bankruptcy, Trading, or Aſſignment; to all which, He is an entire Stranger? Therefore it would be hard to ſuffer ſuch an Action to be maintained againſt *Him*. But *all* theſe Matters are in the *Privity of the Original Plaintiff*: Againſt *whom*, therefore, the Action ought to be brought.

It is ſaid, "the Sheriff acts at *his Peril*."

But it is admitted that the Method of impanelling a Jury would be *no Protection* to Him.

Reply. The Counſel for the Plaintiffs replied, that it is ſtated "That the *Aſſignment* by the Commiſſioners of Bankruptcy "was *previous* to the *Bill of* SALE by the Sheriffs."

The Sheriff's being always a *reſponſible* Perſon, and therefore moſt likely to be made Defendant, is the very Reaſon why He *ought* to be liable to the Party who has received the Injury.

The *Finding*, or even the *Taking Poſſeſſion* of Goods found, is *no* Wrong: But 'tis the CONVERSION that makes the Perſon a *Tort-feaſor*.

They admitted that the Sheriff is *not* anſwerable for the *Irregularity of a Judgment*: (For he is bound to execute the Command of the Writ.) But if He take the *Goods of* ANOTHER PERSON, *inſtead of* the Goods of the Defendant, He *is* anſwerable for THAT.

It has been ſaid indeed, that, "they were *at* THAT *Time* "the Goods of the *Bankrupt* Himſelf."

But be the TAKING lawful, or not lawful, yet here is an *actual* CONVERSION, an *actual* DISPOSITION of the Goods: Which makes him a Treſpaſſer *ab initio*.

It has likewiſe been ſaid, that "the Court will protect "the Sheriff." But the *Relation* goes back, *quite up to the* ACT *of Bankruptcy*.

They denied that the Execution is *ſo entire* that the Sheriff can *not ſtop* in it, after Seiſure and before Sale of the Goods. Suppoſe the Sheriff had confeſſedly ſeiſed *another Perſon*'s Goods, ſhould He be obliged to ſell *them*? *Dalton*'s *Office of Sheriff* ſays, "The Sheriff may impanel a Jury; "and

" and *after that*, ſhall not be anſwerable." Now here He might either have impanelled a Jury; or have kept the Money in his Hands, or brought it into Court, till the Property of the Goods had been determined.

They admitted the general *Principle* of the Caſes cited on the Head of Executions; but *denied the Application* of them to the preſent Caſe. They alſo denied the Principle, " That " a Sheriff ſhall never be a Tort-feaſor *by Relation*:" For, He ſhall in *ſome* Caſes be ſo; as where He takes the Goods with a *bad Original Intention*.

As to *Baily* v. *Bunning*, They endeavoured to diſtinguiſh it. In order to which, they remarked, that there is *no Finding* of an ACTUAL *Converſion*, or what could be called ſo by the Court: It is only a *Demand and Refuſal*; which is ONLY EVIDENCE to a Jury. And the Opinion of the Court there went upon the *Taking*; which they held to be legal: Whereas here is an ACTUAL *Converſion ſtated*. An Action would lie, One would think, againſt the *Vendee* of the Sheriff, in Point of Reaſon: And the *Practice* does ſtrongly ſupport it; for Nine in Ten of theſe Actions *are* brought againſt the *Vendees* of the Sheriff.

In the Caſe of *Bloxham* v. *Oldham*, there was a very *material Difference*, " Whether the Sheriff ſhould have a Ver- " dict *for Him*, or a Verdict *againſt* him:" For in the *one* Caſe, He would *receive* Coſts; in the *other*, He muſt *pay* them.

The Plaintiffs had no Right to call upon the Sheriffs, TILL *the* RETURN of the Writ: And they might *then* have returned " *Nulla Bona*." Therefore this is *not* ſuch a hard Caſe upon the Sheriffs, as is ſuggeſted. And this is not the only Caſe where the Sheriff is to act at his *Peril*: For in taking of Bail, *&c.* He muſt do ſo, as well as here.

If the Sheriff had returned " *Nulla Bona*," the *Onus probandi* would have lain upon the Original Plaintiff.

In the Caſe of *Turner* v. *Felgate*, the Sheriff was certainly excuſable, by Virtue of his Writ.

In the Caſe of *Cole* v. *Davies & al'* in 1 *Ld. Raym.* 724. The Goods were ſold *before* the Commiſſion and Aſſignment. For the Caſe is there put, of a Commiſſion and Aſſignment, *both* of them SUBSEQUENT to the Sale of the Goods. The Words are, " If He ſeizes AND *ſells*," and THEN a " Commiſſion is granted, and the Goods aſſigned, the " Aſſignee may maintain Trover againſt the Vendee:

" But No Action will lie againſt the Sheriff, becauſe he obey-
" ed the Writ." But our Reaſoning in the preſent Caſe is founded upon the *Sale*'s being an *unlawful* Act.

In the Caſe of *Braſſey & al'* v. *Dawſon & al'* there was no Aſſignment, previous to the Seizure.

They did not deny that the Bankrupt had in the preſent Caſe, a *Sort* of Property, a *defeaſible Property*, in Him at the Time of taking the Goods. But in the Caſe of *Clerk* v. *Withers* (reported in 6 *Mod.* 290. and in 1 *Salk.* 323. and in 2 *Ld. Raym.* 1072.) the Defendant in the Action had the whole *indefeaſible Property* in Him; and the Sheriff ought to have gone on: But the Caſe is not applicable to the preſent Caſe; where the Property was only *defeaſible*.

As to the Caſes cited from *Hob.* 206. and *March* 13. They agreed to them.

The *Time* allowed to the Sheriff makes no Difference, (They ſaid;) becauſe He has done Wrong.

And however *entire* a Thing an Execution, in general, may be; yet here it was *irregularly executed*.

The Truth of the Return of " *Nulla bona*," in this Caſe, depends upon the preſent Queſtion.

It is very frequent for Sheriffs to be intangled in Difficulties about their Return. Here, he might have taken a Writ *de Proprietate probandâ*.

Bailey v. *Bunning* turned upon the *Taking*.

Lechmere & al' v. *Thorowgood* only proves " That the " Goods were *in Cuſtodia Legis*." And ſo they were: But to the Purpoſes of the Law; which, in the preſent Caſe, is for the Benefit of the Creditors of the Bankrupt.

CURIA ADVISARE VULT.

And now (*Tueſday* 23d *Novem.* 1756.) Lord MANSFIELD delivered the Opinion of the Court; and ſaid they were *All* agreed, as well as his two Brethren then preſent in Court, as his Brother *Wilmot*; (who was at preſent engaged in another Place,) in their Opinion.

There are *few* Facts *eſſential* to this Caſe; and it lies in a *narrow* Compaſs.

He

He then ſtated the Caſe, (which ſee in *p.* 20. *ante*:) And was very particular in ſpecifying the *Dates* of the ſeveral Tranſactions.

The General Queſtion is, "Whether or no the Action is "maintainable by the Aſſignees, againſt the *Defendants*, the "*Sheriffs*, who have taken AND SOLD THE GOODS."

It is an Action of TROVER.

The bare Defining the Nature of this Kind of Action, and the Grounds upon which a Plaintiff is intitled to recover in it, will go a great Way towards the Underſtanding, and conſequently towards the Solution of the Queſtion in this particular Caſe.

In *Form*, It is a Fiction: In *Subſtance*, a Remedy to recover the Value of Perſonal Chattles *wrongfully* converted by another to his own Uſe.

The Form ſuppoſes the Defendant *may* have come lawfully by the Poſſeſſion of the Goods.

This Action lies, and has been brought in many Caſes where, in Truth, the Defendant has got the Poſſeſſion *lawfully*.

Where the Defendant takes them wrongfully, and by Treſpaſs, the Plaintiff, if he thinks fit to bring *this* Action, waves the Treſpaſs, and admits the Poſſeſſion to have been *lawfully* gotten.

Hence, if the Defendant delivers the Thing upon Demand, No Damages can be recovered in *this* Action, for having *taken* it.

This is an Action of Tort: And the whole Tort conſiſts in the *wrongful Converſion*.

Two Things are neceſſary to be proved, to intitle the Plaintiff to recover in this Kind of Action: 1ſt, *Property* in the Plaintiff; and 2dly, A wrongful *Converſion*, by the Defendant.

As to the firſt, It is admitted in the preſent Caſe, that the *Property* was in the Plaintiffs, as on and from the 4th of *December*, (which was *before* the Seizure,) by *Relation*.

This *Relation* the Statutes concerning Bankrupts introduced, *to avoid Frauds*. They veſt in the Aſſignees, All the Property that the Bankrupt had, at the Time of what I may call the *Crime* committed, (for the old Statutes conſider him as a Criminal:) They make the Sale by the Commiſſioners good againſt All Perſons who claim by, from, or under the Bankrupt, *after* the Act of Bankruptcy; and

againſt all Executions not Served and Executed *before* the Act of Bankruptcy.

Diſpoſitions by Proceſs of Law are put upon the ſame Foot with Diſpoſitions by the Party: To be valid, they muſt be *compleated* before the Act of Bankruptcy.

Till the making of 19 G. 2. c. 32. If the Bankrupt had *bonâ fide* bought Goods, or negotiated a Bill of Exchange; and thereupon, or otherwiſe in the Courſe of Trade, *paid* Money to a fair Creditor, *after* He himſelf had committed a *ſecret* Act of Bankruptcy, ſuch *bonâ fide* Creditor was liable to *refund* the Money to the Aſſignees, after a Commiſſion and Aſſignment: And the Payment, *though* really and *bonâ fide* made to the Creditor, was avoided and defeated by the *ſecret* Act of Bankruptcy.

This is remedied by that Act, in Caſe *No Notice* was had by the Creditor, (prior to his receiving the Debt,) "That his "Debtor was become a Bankrupt, or was in inſolvent Cir-"cumſtances."

Therefore as to the *firſt* Point, It is moſt clear, that the *Property* was *in the Plaintiffs*, as ON *and from the 4th of December*, when the Act of Bankruptcy was committed.

2dly, The only Queſtion then is, "Whether the Defen-"dants are guilty of a wrongful CONVERSION."

That the Converſion itſelf was wrongful, is manifeſt.

The Sheriffs had *no* Authority to SELL the Goods of the *Plaintiffs*; but of *William Johns*, only: They *ought* to have *delivered* theſe Goods to the Plaintiffs the Aſſignees. Upon the Foundation of the legal Right, the Chancellor, even in a ſummary Way, would have ordered them to be delivered to the Aſſignees.

It is *admitted* on the Part of the Defendants, That the innocent *Vendee* of the Goods ſo ſeized can have no Title under the Sale, but is liable to an Action; and that *Godfrey* the Plaintiff would have no Title to the Money ariſing from ſuch Sale, but if He received it, would be liable to an Action to refund.

If the Thing be clearly wrong, the only Queſtion that remains is, "Whether the Defendants are *excuſable*, *though* "the Act of Converſion be Wrongful."

Though

Though the Statutes concerning Bankrupts reſcind all Contracts and Executions not compleated before the Act of Bankruptcy, and veſt the Property of the Bankrupt in the Aſſignees by Relation, in order to an equal Diviſion of his Eſtate among his Creditors, yet they do *not* make Men *Treſpaſſers or Criminal by Relation*, who have *innocently* received Goods from Him, or executed legal Proceſs, not knowing of an Act of Bankruptcy: *That* was not neceſſary, and would have been unjuſt.

The injury complained of by this Action, for which Damages are to be recovered, is *not the Seizure*, but the *wrongful* Converſion.

The *Aſſignment* was made upon the 8th of *December*; the *Sale*, not till the 28th of *December*; the *Return*, not till the Octave of Saint *Hilary*, (which is the 20th of *January*.)

The Sheriff acts at his *Peril*; and is *anſwerable for any Miſtake*: Infinite Inconveniences would ariſe, if it were not ſo.

At the *Time* of the Sale and Return, it was more notorious "that theſe Goods belonged to the Plaintiffs," than it could probably have been in the Caſe of any third Perſon; becauſe Commiſſions of Bankruptcy and the Proceedings under them are *public* in the Neighbourhood, and indeed all over the Kingdom.

This Converſion is 20 *Days after* the Aſſignment.

The Defendants have here made a direct *falſe return*: They have returned "That they took the DEFENDANT'S Goods, *&c.*" whereas they were, (*at the Time of the Return*,) notoriouſly the *Goods of the* ASSIGNEES, when they were *taken*. They certainly might, and ought to have returned, "*Nulla bona*;" which was the Truth: For the Goods taken, were, beyond all Manner of Doubt, the Goods *of the Aſſignees*, at the *Time when* the Sheriffs *took* them; and the Bankrupt *could* have *no* Goods, after the 4th of *December*, when he had committed an act of Bankruptcy. They would have been juſtified by the Truth of the Fact, if they had made this Return: For the *Bankrupt* neither had nor could have any Goods of his *own*, at *that* Time. It is arguing in a Circle, to ſay "That they could not "return *Nulla bona*, *becauſe* they were obliged to ſell; "and they were obliged to ſell, *becauſe* they could not return "*Nulla bona*."

The *Seizure* is, here, out of the Caſe: For the Point of *this* Action turns upon the *injurious* CONVERSION.

Therefore

Therefore We are All of Opinion that the Plaintiff is intitled to recover, in *this* Action.

But the Objections have been made, by the Gentlemen who have argued this Case on Behalf of the Defendants.

It has been said " That the Execution is *entire*; for the Debt is discharged by a Seizure in *Fi. fa.*. That, being entire, if once lawfully begun it *must* be compleated; for Goods taken by a *Fi. fa.* shall be sold by the Representative of the Sheriff."

" That they shall be sold, though the Plaintiff dies; and the Money arising by the Sale shall not be recovered back by the Defendant:" Which is the Case of *Clerk* v. *Withers*, 1 *Salk.* 323. 2 *Ld. Raym.* 1072. S. C. and 6 *Mod.* 290. S. C.

" That a Writ of Error is no *Superfedeas*."

" That the Sale by the Sheriff shall not be avoided against the Vendee, by a subsequent Writ of Error and Reversal:" Which is the third Point in *Matthew Manning*'s Case in 8 *Co.* 96.

Answer. All this is true, (and upon the plainest Reason,) *as between* the Plaintiff and the Defendant, *Parties* to the Judgment in Consequence of which the Execution issues; but no way applicable to the Case of a *third* Person.

None of these Cases authorize the *Sheriff to sell* the Goods of a THIRD *Person:* And it is admitted that the *Vendee* is not protected, here; because, at the Time of the Sale, the Sheriff had no Authority to sell.

[He then went minutely through the Cases; shewing the Grounds upon which the Determinations proceeded, as against the *Parties* to the Judgment, who are *bound* by it, and every Thing done in Consequence of it.]

But the Argument from these Principles to the present Case, is this: " Here the *Taking* was *lawful*; and *therefore* " the Sheriff was *bound* to complete the Execution, by a Sale." Answer. The Premisses are not true; and if they were, the Conclusion would not follow.

The Taking was *not* lawful; because they were *then* the Goods of a third Person.

But

But if the Taking were lawful, the Sheriff ought not to go on to a Sale, *after* a full Diſcovery that the Goods then belonged to a third Perſon.

To prove the Taking lawful, and that therefore the Sheriffs ſhall not be liable to an Action, were cited the Caſes of *Bailey* v. *Bunning*, reported in 1 *Leon.* 173, 174. 1 *Siderf.* 272. and 2 *Keble* 32, 33. [*V. Ante* 24, 25.] *Lechmere* v. *Thorowgood*, in *Comb.* 123. 1 *Shower* 12. and 3 *Mod.* 236. [*V. Ante* 24, 25.] and *Cole* v. *Davies & al'*, 1 *Ld. Raym.* 724. [*V. Ante* 25.]

The Fallacy of the Argument from the Authority of theſe Caſes, turns upon uſing the Word "*lawful*," equivocally in two Senſes.

To *ſupport* the Act, It is *not* lawful: But to *excuſe* the Miſtake of the Sheriff through unavoidable Ignorance, It *is* lawful. Or, in other Words, The Relation introduced by the Statutes, binds the *Property*: But the Men who act innocently at the Time, are not made *Criminals* by Relation; and therefore they are excuſable from being puniſhable by Action or Indictment, as *Treſpaſſers*. What they did, was Innocent, and in *that* Senſe, lawful: But *as a Ground* to ſupport a wrongful Converſion, by Sale after a Commiſſion publickly taken out and an actual Aſſignment made, It was *not* lawful.

In the Caſe of *Bailey* v. *Bunning*, the Goods were clearly *bound by the Teſte*. It is beſt reported in *Levinz*. The Queſtion referred by the Special Verdict was upon the TAKING; *viz.* "Whether the Party was guilty in the TAK-"ING;" and the Court excuſe the Bailiff for his *innocent executing* his Writ. The Caſe of *Philips* v. *Thompſon*, in 3 *Levinz* 192. expreſsly ſays "that this Reſolution in the "Caſe of *Bailey* and *Bunning* was *only in Excuſe* of the *Bailiff* "for executing the Writ."

Siderfin does not ſeem to know what the Court was going upon: For the Court tied it up to the *Taking*; whereas he does not ſeem to diſtinguiſh between the *Trover* and the *Treſpaſs*. [*V.* 1 *Siderf.* 272.]

The Caſe of *Lechmere* v. *Thorowgood* is beſt reported in 1 *Show.* 12. And this Report (which is the only clear State of it in any of the Reports) puts it *ſingly* upon the making the Officers, who had *good Authority* and took the Goods lawfully, *Treſpaſſers by* RELATION.

Comberbach,

Comberbach, in *giving the* JUDGMENT of the Court, which is the only ſenſible Part of his whole Report, (for it is plain to me, that he did not underſtand the *former* Argument on the *former* Day, which is the firſt Part of his Report of the Caſe,) agrees with *Shower*; and ſays that "the Court "were of Opinion that a Conſtruction ſhould not be made; "to make the Officer a *Treſpaſſer by Relation*: For the *Taking* was *lawful*, *at the Time*." But He muſt be miſtaken in the firſt Part of this Report: For Lord Chief Juſtice *Holt* could never ſay "That the Property of the Goods is "veſted by the *Delivery* of the *Fieri Facias*; and the Extent "for the King afterwards comes too late." No *Inception* of an Execution can bar the Crown: This Matter was lately very fully diſcuſſed in the Court of Exchequer in the Caſe of the *King* and *Cotton*.

As to the Caſe of *Cole* v. *Davies & al'*, reported in 1 *Ld. Raym.* 724. "That *no* Action will lie againſt the *Sheriff*, "who, *after* the Bankruptcy, ſeiſes *and ſells* the Goods, "under a *Fieri Facias* to him directed;" (which is there ſaid to be ruled by Lord Ch. Juſt. *Holt* at *Niſi prius*, in *Hil.* 10 *Wil.* 3.) Theſe Notes were taken in 10 *W.* 3. when Lord *Raymond* was young, as ſhort Hints for his own Uſe: But they are too incorrect and inaccurate, to be relied on as Authorities. The Note ſtates four general Reſolutions upon Evidence, in a Trial at *Niſi prius*; but does not ſtate the Caſe or Queſtion to which the Reſolutions were applied: (Though, by the Particularity of the fourth Reſolution, I conjecture *that* to have been moſt immediately adapted to the Caſe then in Judgment.) The firſt Reſolution is an *Obiter* Reference to the Determination in *Bailey* and *Bunning*; and it might not be at all material, to attend to the Diſtinction between Trover and Treſpaſs. Beſides, the Caſe there put is of a Sale by the Sheriff, *before the Commiſſion*; and the Converſion might be as excuſable as the Taking, *becauſe he obeyed the Writ*: Whereas here, the Goods were not *ſold* till AFTER *both* Commiſſion and Aſſignment. It is a looſe Note of what was ſaid *Obiter*: It manifeſtly refers to the Caſe of *Bailey* and *Bunning*; but is no Authority applicable to the preſent Caſe.

There are, in the Courſe of Trade, numberleſs Acts of Bankruptcy *in Fact committed*, where no Commiſſion is ever taken out. Therefore it would be very hard, to make the Sheriff a TRESPASSER for TAKING the Goods of a Perſon who might *privately* and *ſecretly* have committed an Act of Bankruptcy, and perhaps many *Years before* too, and on which no Commiſſion might ever afterwards iſſue, and which the Sheriff could not poſſibly know. But None of theſe Reaſons hold, to juſtify the making a *falſe Return*, and *Selling the Goods after* a Commiſſion and an Aſſignment.

Argu-

Arguments have been urged from Inconvenience, if the Sheriff ſhould be made liable: becauſe He is *obliged* to ſell.

But the Sheriff may take an *Indemnity* from the Plaintiff, in Caſe there be a Doubt concerning the Property of the Goods. Poſſibly, *this Court* might interfere, if the Sheriff was reaſonably doubtful about the Property: At leaſt, they would have given him *Time* to make his Return. Or he might have put it on the Parties concerned in Intereſt, to litigate their Right, by filing a Bill in Chancery againſt them, to oblige them to interplead, in order to *aſcertain to whom* the Property belonged. Or He might *oblige* the Aſſignees to prove the Act of Bankruptcy, and the Aſſignment.

And notwithſtanding what has been urged as to the Hardſhips that Sheriffs will be under, there can hardly a Caſe exiſt, where there will be any Hardſhip upon the Sheriff, where the Taking *and* Sale, or even the *Sale only*, are SUBSEQUENT *to the Aſſignment*. But in the preſent Caſe, the Sheriffs *knew* of the Bankruptcy, *before they ſold* the Goods.

There are much *greater* Hardſhips upon *other third* Perſons concerned in pecuniary Tranſactions with Bankrupts: Which hardſhips they are nevertheleſs left ſubject to; becauſe it was neceſſary that they ſhould be ſo, in order to ſecure the *End* and Intention of the Act relating to Bankrupts; namely, the Securing their Effects for the equal Satisfaction of their Creditors.

The Commiſſion and Aſſignment are, both, *notorious* Tranſactions; ſo that a Sheriff cannot well be hurt, by being left liable to this Action: Whereas there would be Danger, if it were otherwiſe, of great Colluſion being practiſed by Sheriffs, on theſe Occaſions; which might be encouraged by a contrary Reſolution. The *Seizure* here is after the Act of Bankruptcy committed, and therefore after the Property by Relation is veſted in the Aſſignees: But *that* was *innocent*, and *excuſable*; and the Sheriff ſhall *not* be *liable by relation*, as a WRONG-*Doer*. The Gift of *this* Action is the *wrongful* CONVERSION, by the *Sale*; and *falſe Return*, long *after* the Commiſſion and *Aſſignment*.

Therefore *per Cur.* unanimouſly, The Action is maintainable, in *this* Caſe, againſt the Defendants; and there muſt be Judgment for the Plaintiffs.

Judgment for the Plaintiffs.

Robinſon *verſ.* Robinſon.

This was a Caſe out of Chancery, on a Will.

ON the 27th of *July*, 1723, *George Robinſon* of *Bochym* in the County of *Cornwall*, Eſq; duly made his Will: And, after giving his Wife one Guinea, and his Father-in-Law a Groat, He deviſed as follows—" I bequeath ALL *my* " *Real Eſtate* (excepting my Eſtate in the Pariſh of *Endel-* " *lyon*, late Mr. *Newman's*, and all my Preſentations in the " ſaid County,) to *Lancelot Hicks*, of *Plymouth*, in the Coun- " ty of *Devon*, Gentleman, for and during the Term of his " natural Life, AND NO LONGER: Provided that he alter " his Name, and take that of *Robinſon*, and live at my Houſe " of *Bochym*. And after his Deceaſe, to SUCH *Son* as he " ſhall have, lawfully to be begotten; taking the Name of " *Robinſon*. And for Default of SUCH *Iſſue*, Then I be- " queath the ſame to my Couſin (the Defendant) *William Ro-* " *binſon*, Rector of *Landewedneck* and his Heirs for ever."

" *Item.* My Will and Deſire is, That *He* (meaning " *William R.* Rector of *Landewedneck*,) have Liberty to pre- " ſent whom he pleaſes to any Vacancy that ſhall hap- " pen in any of my Preſentations, during his Life; and " in Caſe any of his Children ſhall take or be deſign- " ed for Holy Orders, Then it is my deſire that in " Caſe of any Vacancy in either of my Preſentations, " that Bonds of Reſignation be taken, to ſuch Child or " Children, if the Vacancy happen before He or They at- " tain ſuch Orders: And after the ſame ſhall be diſpoſed " of as aforeſaid, Then I give *the* PERPETUITY *of the ſaid* " *Preſentations*, to the ſaid Mr. *Lancelot Hicks*, in the *ſame* " *Manner*, and to the *ſame Uſes*, as I have given my Eſtate."

And after bequeathing ſome Legacies, He gave all the Reſt of his Goods and Chattles, together with his Eſtate at *Endellyon*, to his ſaid Kinſman *William Robinſon*; and made him ſole Executor.

This *William Robinſon* was Heir at Law to the Teſtator.

On the 30th of *September*, 1728, The Teſtator died without Iſſue; leaving the ſaid *William Robinſon* his Heir at Law.

Lancelot Hicks was then living; and took the Name of *Robinſon*: And, *after the* Teſtator's Death, had two Sons;

George,

George, his eldeſt; and the Plaintiff *Edmund*; (Both of them born after the Teſtator's Death.) And *Lancelot Hicks* entered upon the Eſtate, and lived at the Teſtator's Houſe at *Bochym*. And his *Eldeſt* Son, *George*, was called by the Name of *Robinſon*; and DIED *in March* 1738, an Infant; in the Life-time of the ſaid *Lancelot Hicks*, his Father, and of the Plaintiff his younger Brother.

Lancelot Hicks, *alias Robinſon*, died in *July*, 1745; leaving the Plaintiff *Edmund Hicks*, *alias Robinſon*, his ONLY SURVIVING SON, an Infant: Who brought his Bill in Chancery, to have a Conveyance.

Short State of the Caſe——The Title of the Plaintiff appears to be ſtated thus——That *Lancelot Hicks* took the Eſtate, and complied with the Condition; and then had two Sons born: The *Eldeſt* Son died an Infant, *in his Life-time*. Then *Lancelot* himſelf died: On whoſe Death, *William Robinſon* claims the Eſtate; the *firſt* Deviſe "to the "*Son* of the Body of *Lancelot*," being already SATISFIED by the BIRTH *and* DEATH of *George*, *Lancelot*'s *Eldeſt* Son, as the Claimant ſuppoſes.

Queſtion. "*Whether* ANY *and* WHAT *Eſtate or Intereſt* is "veſted in the Plaintiff *Edmund Robinſon*, the Infant, *(Lance-* "*lot*'s ſecond Son,) by Virtue of the ſaid Will."

This Caſe was thrice argued: 1ſt in *P.* 26 *G.* 2. on 15 *May* 1753, by Mr. *Pratt* for the Plaintiff, and Mr. *Yorke* for the Defendant; Again, in *P.* 29 *G.* 2. on 14th *May* 1756, by Mr. *Norton* for the Plaintiff, and Sir *Anthony Abdy* for the Defendant; and laſtly, in *M.* 30 *G.* 2. on 23d *November* 1756, by Sir *Richard Lloyd* for the Plaintiff, and Mr. *Perrott* for the Defendant.

Argument for the Plaintiff.

For the Plaintiff *(Edmund Robinſon,)* it was urged that the Teſtator certainly *meant* to give an Eſtate-Tail to Mr. *Lancelot Hicks* and *all* his Iſſue: And the INTENTION *ſhall prevail, where it may*. *Ow.* 29. *Coſen*'s Caſe. *Cro. Jac.* 448. *King* v. *Rumball*. *Doe ex dimiſſ. Barnard* v. *Reaſon*, *Tr.* 28 *G.* 2. *B. R.* That the Eſtate to *Lancelot Hicks* was *intended* to be an Eſtate TAIL: but, at leaſt, here is either an Eſtate in *Fee*, or for *Life*, in his SON, the Plaintiff.

As to the Condition, "to take the Name of *Robinſon*;" the Eſtate muſt *firſt* VEST, before the Condition can be performed.

This is a Condition *ſubſequent*; as appears by *Plowd.* 23. *Colthirſt* v. *Beinſhin*; and therefore has nothing to do with the *veſting* of the Eſtate. *Caſes in Chancery in Lord Talbot*'s *Time* 166. Sir *John Robinſon* v. *Comyns*. "No par-

"ticular

" ticular technical Words are requiſite, to make either pre-
" cedent or ſubſequent Condition." And it was holden by the Lord Chancellor, in the Caſe of *Trafford & Ux'* v. *Sir Ralph Aſhton & al'*, 2 *Vern.* 661. That this Clauſe in a Will, " Taking on Him the Name and Arms of *Vævaſor*," was a condition *ſubſequent*, to defeat the Eſtate; and NOT *precedent*. Therefore They ſhould lay this Condition out of the Caſe.

And then the ſimple Limitation will ſtand thus: It will be To *Lancelot Hicks* for Life; Remainder to SUCH SON *as he ſhall have lawfully, &c.*; Remainder (for Default of *ſuch* Iſſue) to the Teſtator's Couſin *William Robinſon*, in Fee. This is the *ſimple* Limitation; putting the Condition ſubſequent, out of the Caſe.

First Point. And this is intended to be an Eſtate *Tail* in *Lancelot Hicks*.

It may be objected, that this cannot be an Eſtate Tail in *Lancelot*; becauſe here are *no Words of Limitation*: For that the Word Son is a Word of *Purchaſe*, *not of Limitation*, even if it was in the Plural; and that here, " Son" is in the *ſingular* Number, (" and to ſuch SON as he ſhall have, lawfully begotten;") which, it may be urged, cannot be conſidered otherwiſe than as a Word of Purchaſe.

Another Objection may be raiſed, becauſe it is limitted to *Lancelot Hicks* himſelf for *his Life*, " *And* NO *longer*:" And therefore it may be urged that the Court cannot raiſe an Eſtate Tail by *Implication*, contrary to theſe *negative* Words.

But 1ſt, The Word " *Son*" muſt here be taken as a Word of LIMITATION: Becauſe otherwiſe it would not be agreeable to the Teſtator's *manifeſt Intention*, " that the " *Iſſue* of ſuch Son ſhall have it afterwards, and that *Wil-*
" *liam Robinſon* ſhould not take, *till* the Iſſue of *Lancelot Hicks*
" ſhould be *All* of them extinct."

The *Change of Name* ſhews that the *Intention* of the Teſtator *extended* to the *whole Family* of the *Hickſes*. So do the Words " *lawfully to be begotten*:" Which Words properly belong to Eſtates Tail. So, " for *Default of ſuch Iſſue*."

The Words will *bear* this Conſtruction. They are, " To " *ſuch* Son as he ſhall have, lawfully to be begotten:" *i. e.* lawfully iſſuing from his Body.

" *Son*" is, *here* Nomen COLLECTIVUM. *King* v. *Melling* is in Point: And ſo is *Byfield*'s Caſe, there cited. (1 *Ventr.* 231.) And many other Caſes there cited.

So that *William Robinſon* was not to have it, TILL *Lancelot Hicks* ſhould be dead *without* ANY *Iſſue*. 2dly,

2dly, As to the Words " for Life, *and* NO *longer*:"— There had been no difficulty or Impediment, if the latter Words " *and no longer*" had not been added. 1 *Ld. Raym.* 203. *Loddington* v. *Kime.* 1 *Peere Wms.* 605. *Blackborn* v. *Hewer Edgeley.* 9 *Co.* 127. *b. Sunday*'s Caſe.

And yet they have really no Force at all in them, beyond the former words: They are certainly tautologous, and have no additional Effect. An Eſtate for Life was given by the former Words: And ſuch an Eſtate can laſt no longer than that Life laſts.

In *Archer*'s Caſe, 1 *Rep.* 66. *b.* it was ruled to be an Eſtate for Life in *Robert Archer*; Becauſe it was an *expreſs* Eſtate for Life, deviſed to him. But Tautology does not make it MORE *expreſs.*

1 *Ro. Abr.* † 837. is, in Point, contrary to what my Lord Ch. J. *Hale* is reported in 1 *Ventris* 231. in the Caſe of *King* v. *Melling*, to have ſaid. He there cites from *Roll.* 839. (as that Report ſays) the Caſe of a Deviſe " to the Teſtator's " Eldeſt Son, for Life, & *non aliter*;" (For ſo, ſays he, were the Words, tho' not printed in the Book;) and after his Deceaſe, to the Sons of his Body. This, ſays my Lord Ch. J. *Hale*, was but an Eſtate for Life, *by reaſon* of the Words " NON ALITER."

† *Note*; This Caſe is cited in 1 *Ventr.* 231. as from *Rolle* 839. But that is a Miſtake of the Page; for it is really in 1 *Ro. Abr.* Title *Eſtate*, Letter *P. page* 837. *pl.* 13.

But the *true* Reaſon of the Determination of that Caſe in *Rolle*'s *Abridgment*, appears from what *Levinz* ſays in his own Argument of *King* v. *Melling*. [*V.* 2 *Lev.* 58, 59.] For *Coleman*, who *argued* " that *Bernard* took only for Life," had cited that Caſe from *Rolle* as an Authority on his Side. *Levinz*, *contra*, argued that *Bernard* took an Eſtate Tail. And in anſwering the Caſes cited againſt him, He ſays, " And as to the " Caſe 1 *Rol.* It there appeared, the *Deviſor's Intent* was that " the Father ſhould be only Tenant for Life, the Eſtate Tail " to the Son: *For* that the *Clauſe to reſtrain Alienation* is added " *only* to the Eſtate of the *Son.*" So that if this was not a Miſtake of the Reporter, it is, at the moſt, but an extrajudicial Opinion of a ſingle Judge, and not the Point of the Caſe then under Conſideration. Therefore *that* could not be the Principle of Law upon which that Caſe was determined: It muſt have been a *Regard* to the *Intention* of the Teſtator; and the particular Words muſt have been conſidered as a *Key* to that Intention. And the ſame Obſervation will hold with regard to the Caſes of *Loddington* v. *Kime*, *Backhouſe*, v. *Wells*, *Lomax* v. *Homeden*, *Plunket* v. *Holmes*, and *Shaw* v. *Weigh*; and will ſerve to reconcile them.

The true Rule is, That where the Iſſue cannot take an Eſtate Tail, without taking it *through* the Father, the Father

ther ſhall have an Eſtate Tail: Otherwiſe not. *Archer's* Caſe, 1 *Rep.* 66. Where the Eſtate is given over. *Cro. Eliz.* 313. *Clerk* v. *Day.* 1 *Ro. Abr.* 139. Letter U. *pl.* 4. S. C.

Backhouſe v. *Wells*, in *Equity Caſes Abr.* 184. *pl.* 27. in *Trin.* 11 *Ann. B. R.* "Deviſe to *J. B.* for *his Life* ONLY, "without Impeachment of waſte." *J. B.* was *not* MEANT to be Tenant in Tail. [See *Forteſcue's Reports* 133. and *Lucas* 181. S. C.]

Langley v. *Baldwin*, is in *Equity Caſes Abr.* 185. *pl.* 29. ſaid to have been certified to be an Eſtate for *Life only*. But this is a Miſtake: For it was certified, [and ſo it appears, as Lord *Mansfield* ſaid, by the Regiſter's Book,] to be an Eſtate Tail.

However, the Principle of that Determination was, to purſue the Teſtator's Intention: Which was, "that it ſhould "go to *all* the Children of his Grandſon."

Loddington v. *Kime*, 3 *Lev.* 432. 1 *Ld. Raym.* 203. was an Eſtate deviſed to the *Iſſue of* the Iſſue Male. So no Violence done to the Intention, by conſtruing the *firſt* Eſtate to be an Eſtate for Life.

Shaw v. *Weigh*, *P.* 1 *G.* 2. *B. R.* reverſed *in Dom' Proc':* And determined to be an Eſtate Tail. [See *Modern Caſes in Law and Equity* 252. 382. *Fitz-Gibbons* 7. and *Parliament Caſes*, of *April* 1729. and *Forteſcue's Reports* 58.]

Be the Circumſtances as they may, yet the Teſtator plainly means, *not merely* an Eſtate for Life to *Lancelot Hicks*; but he *alſo* means to give an Eſtate *Tail to the Hicks* FAMILY. Therefore let the Intention of a Life-Eſtate be ever ſo ſtrong, yet the Court will conſtrue his plain and clear *Intention for the Benefit of the* FAMILY, to prevail.

Second Point. 2dly, But if it be not conſtrued an Eſtate *Tail*, but "*Son*" be conſidered as a Word of *Purchaſe*; Then theſe Queſtions will ariſe: 1ſt, WHO ſhall be the Taker? 2dly, At WHAT TIME? 3dly, WHAT ESTATE?

1ſt, The preſent Caſe *was* indeed uncertain *at the Creation*; though *rendered certain*, by the Event. And perhaps it was not a *veſted* Remainder; from the Uncertainty who ſhould take.

2dly, But ſuppoſing it to be a *contingent* Remainder, yet the original Uncertainty was removed within ſufficient Time. The Limitation over ſeems to confine it to the Time

Time of the Father's Death: And *then* the Plaintiff *Edmund was the* ONLY *Son.* And the contingent Remainder veſts Time enough, if it veſt *then.*

3dly, It is a deviſe of all his Real Eſtate, except that at *Endellyon:* which alone would paſs the Fee-ſimple. 6 *Mod.* 109. *Counteſs of Bridgwater* v. *Duke of Bolton.* 1 *Salk.* 236. S. C. *Scott* v. *Alberry.* *Comyns* 337. 340. *Ibbetſon* v. *Beckwith,* reported by Mr. *Forreſter,* in his *Caſes in Equity, pa.* 157.

And the Exception ſhews that He did not mean the *Reſt* to go to his Heir at Law.

The Teſtator plainly meant it to be a *Fee:* He would never oblige the Deviſee to part with his Family-Name, and take his *Name,* only for an Eſtate for *Life.*

Then He gives the *Perpetuity* of all his Preſentations in the ſame Manner as he had given his Eſtate: Which muſt mean a PERPETUITY in *both*; and conſequently proves him to have *meant a* FEE in the Land.

And the Limitation over proves the ſame; *viz.* "That "*William Robinſon* was never to take, *but* on *L. Hicks*'s *dying* "WITHOUT ISSUE." However, If this was not a Deviſe of a Fee, it muſt then be an Eſtate *Tail.* 1 *Ventr.* 225 *to* 232. *King* v. *Melling.* *Moore* 397. *pl.* 15. 1 *Anderſon* 43. N°. 110. S. C. *Bendloe* 30. *pl.* 124. S. C.

But it is at leaſt an Eſtate *for Life:* Otherwiſe, all this Part of the Will muſt be rejected.

Argument for the Defendant.

The Counſel for the Defendant *William Robinſon* made two Queſtions—Firſt, What Eſtate is deviſed *to Lancelot Hicks,* the Father of the Plaintiff; *viz.* Whether for *Life,* or in *Tail?*

Secondly, IF for *Life*; then whether the contingent Remainder is to *veſt* UPON *the Birth of a Son, during* the Life of *Lancelot Hicks,* the Father; (which, if it be ſo, has been *ſatisfied* by the Birth of *George Hicks,* the Son;) Or whether it veſted ON *the* DEATH *of the Father,* in his THEN eldeſt Son; (which *then* eldeſt Son is the now Plaintiff.)

They laid out of the Caſe——

1ſt, The Words of Condition annexed to the Eſtate of the Father; conceding that they were Conditions *ſubſequent,* to defeat the Eſtate, and not precedent, to hinder it from veſting.

2dly,

2dly, The *Son*'s taking the Name: For they allowed that the Conſtruction of the Words, *as* to the *Son*, muſt be the *ſame* as of thoſe relating to the *Father*.

But they conſidered as material,

First Queſtion. 1ſt, Whether the Eſtate to *Lancelot Hicks* be an Eſtate for *Life*, or in *Tail*. Which they ſubdivided into two other Queſtions; *viz.*

Firſt, "Whether the Court CAN *raiſe* an Eſtate *Tail by* "IMPLICATION, *at all*, in *this Caſe*; This being an EX-"PRESS Eſtate for Life, and even confirmed by *negative* "Words."

Secondly, "Whether the Court can raiſe an Eſtate Tail "*by Implication*, *upon* EITHER *of theſe Expreſſions*; *viz.* After "his Deceaſe, to ſuch SON as he ſhall have; or, and for "Default of *ſuch* Iſſue."

Firſt—In the Caſe of *King* v. *Melling*, Lord Ch. Juſt. *Hale* was the firſt great Judge, who put the Caſes together, to raiſe an Eſtate Tail *by Implication*. But ſucceeding Judges differed from Him: And in the Caſe of *Luddington* v. *Kime*, in 1 *Ld. Raym.* 204. Mr. Juſt. *Powell* argued againſt Lord *Hale*'s Opinion; Ch. Juſt. *Treby* agreeing with Lord Ch. Juſt. *Hale*.

In 1 *Peere Wms.* 605. *Blackborn* v. *Hewer Edgely*, *& è contra*. Lord Chancellor *Parker* explodes that Opinion, "That Words of Implication ſhould *not* turn an expreſs "Eſtate for Life into an Eſtate Tail:" And ſays, "That "a Deviſe to *A.* for Life; and after his Death without Iſſue, "then to *B. will* give an Eſtate Tail to *A.*" Yet this Conſtruction would be directly contrary to the Words of the Teſtator.

But the preſent Caſe is within Lord Ch. Juſt. *Hale*'s Diſtinctions. He ſays that "*Non aliter*" is ſufficient to make it an Eſtate for Life *only*; *viz.* where the Deviſe is, "to *A.* for Life, *& non aliter.*" 1 *Ventr.* 231.

In *Backhouſe* v. *Wells*, *Forteſcue* differs from Lord *Raymond* in the Account of it; and lays Streſs upon the Word "*only*," as being explanatory and reſtrictive in a doubtful Caſe. [See *Backhouſe* v. *Wells* reported by *Lucas*, *fo.* 181. and *Forteſcue* 181. and cited in 2 *Ld. Raym.* 1439, 40.] And in *Bagſhaw* v. *Spencer*, Lord Chancellor ſaid it was determined upon the Word "*only*," in that Caſe of *Backhouſe* v. *Wells*.

In

In *Bamfield* v. *Popham*, 1 *Peere Wms.* 54, 55. Lord Ch. Juſt. *Trevor* reaſons againſt Lord Ch. Juſt. *Hale*. So alſo does Mr. Juſt. *Powell*, in the ſame Caſe, *fo.* 57. And ſurely nothing can be ſtronger than *expreſs* Words, *with* NEGATIVE *Ones* ADDED *to them*. And they ſhall not be rejected; according to 2 *Bulſtr.* 176. *Mirrill* v. *Nichols*; and 2 *Peere Wms.* 282. *Barker* v. *Giles*. *Plowden* 523.

In the Caſe of *Humphry* v. *Taylor*, 5th *February* 1752, The Court of Chancery held reſulting Truſts to be rebutted by negative Words.

Goodtitle ex dimiſſ. Croſs v. *Wadhold*, *Mich.* 19 *G.* 2. *C. B.* was a Deviſe to the Teſtator's eldeſt Son, ONLY *for Life*; and in the Caſe of *Failure of Iſſue*, &c. it ſhall deſcend and come to his (the Teſtator's) Male Children, &c. And they held this to be an Eſtate for LIFE ONLY; becauſe, being expreſſed to be given for Life *only*, with *Negative* Words, it could not be *enlarged by Implication*: And Lord *Hale*'s Opinion in the Caſe of *King* v. *Melling*, and the Determination in *Backhouſe* v. *Wells*, were then relied on by the Court of Common Pleas.

2d Subdiviſion of the firſt Point, *viz.* Whether the Court can raiſe an Eſtate Tail by Implication, *upon either of theſe Expreſſions*; *viz.* "After his Deceaſe, to ſuch *Son* as he ſhall "have;" or, "and for Default of *ſuch* Iſſue."

And they argued that they could *not*. For

Firſt, The Word "*Son*" muſt be taken as a Word of PURCHASE: "And from and after his Deceaſe, to ſuch "*Son* as he ſhall have, lawfully to be begotten." "*Son*" is here a Word of *Purchaſe*; Whether it be taken ſingularly, or collectively.

If ONE *Son* ONLY be meant, Then the Words "for Default of *ſuch Iſſue*," *refer* TO SUCH *Son*, taking an Eſtate for Life. And the Word "*Son*" is *ſingular*; Not collective, *here*. He might have uſed the Terms "Heir," "Heir "Male," &c. 1 *Ventr.* 230. *Burley*'s Caſe, there cited: Where the Remainder is limited to the next Heir Male. *Miller* v. *Segrave*, *M.* 10 *G.* 1. *B. R.* cited in *Robinſon's Treatiſe of Gavelkind* 96. The Remainder was "to the next *Heir* "Male:" (Which Caſe was cited, to ſhew the Conſtruction of the Word "*Heir*," in the ſingular Number.)

In *Trollop* v. *Trollop* in *C. B.* (*v. Robinſon on Gavelkind* 96.) *Eyre* argued againſt the Opinion of Lord *Coke* in the Caſe of *Clerke* v. *Day*, *Moore* 593. (the beſt Report of that Caſe.)

They cited 2 *Ventr.* 311. *Burchet v. Durdant*, only to ſhew that no Application can be made of thoſe Caſes to the preſent.

2d Branch of this 2d Subdiviſion, *viz.* As to the Word "*Iſſue.*"

This Word, taken *Technically*, is indeed a Word of *Purchaſe.*

King v. *Melling* was the firſt Caſe where it was holden to oparate as a Word of *Limitation in a* WILL.

The Word "*Children*" is leſs operative than the Word "*Iſſue.*" Each of theſe is a *Nomen Collectivum:* But "*Son*" is *Deſignatio Perſonæ*; unleſs other Words explain it. 1 *Ro. Abr.* 837. Letter P. *pl.* 12, 13.

As to *Byſie'd*'s Caſe, mentioned only in Lord Ch. Juſt. *Hale*'s Argument in 1 *Ventr.* 231. and in no other Book—It comes the neareſt to the preſent Caſe, of any other cited on the Part of the Plaintiff. The Word "*Son*" was there holden *to be Nomen Collectivum.* But there was *no* EXPRESS Deviſe to the Son: It is a Deviſe to *A:* "And if he dies, "*not having a Son*, then to remain, *&c.*" Whereas here, the Words are, "*to ſuch Son* as he ſhall have, lawfully iſſu-"ing from his Body."

But if "Son" be taken as a Word of Purchaſe—It is aſked WHAT *Son* is meant? And *what Eſtate?*

Anſwer. It can mean *but* ONE Son: The Sons of *Lancelot Hicks* could not *all* take as Tenants in Tail, or as Joint-tenants. In the Caſe of *Liddington* v. *Kime*, 1 *Ld. Raym.* 206. Lord Ch. Juſt. *Treby* is very expreſs on this Head, "That if it "had been the Word *Son*, it had been without Controverſy."

2 *Leon.* 35. *Leonard Lovelace*'s Caſe, (*Cro. Eliz.* 40. S. C. *Savile* 75. S. C.) and *Moore* 371. S. C. cited, is very ſtrong to the ſame Effect. Deviſe to *A.* and to his *Eldeſt* Iſſue Male *de Corpore ſuo exeuntis* (or "*ſeniori exitui maſculo ſuo*," according to *Moore:*) 'Tis only an Eſtate for Life in *A.* Remainder to his *Eldeſt* Son, *&c.* for Life.

In Canc': In another Part of this very (preſent) Caſe, on this very Will, 17th *April* 1733. Sir *Joſeph Jekyll* held *Lancelot Hicks* to be intitled to an Eſtate for Life; Remainder to his Eldeſt (and but One) Son for Life; Remainder to *William Robinſon*, the Deviſee over. This Cauſe was between the Widow of the Deviſor; and *Lancelot*, the firſt Deviſee. And the Deeds were brought *into Court:*

Court: Whereas they muſt have been delivered to *Lancelot*, if he had been Tenant in Tail. In 1734, Lord *Talbot*, on a Rehearing, was of the ſame Opinion. And We cite it for *their Opinions* only: We do not ſay that the preſent Plaintiff is *bound* by this Decree.

Then *if* ONE Son *only* could take, it follows, of Courſe, that the Words "And for Default of *ſuch Iſſue*," are *reſtrained to* SUCH *One Son* ONLY.

And as to the Eſtate, It is only an Eſtate for *Life*, in that *One* Son: For here are *no Words of Limitation*, at all.

As to the Arguments drawn from the *Advowſons*, and the Obligation to take the *Name* of the Teſtator.—The *Advowſons* are given for the Benefit of any of *Lancelot*'s Children that ſhould go into Orders: And then the Teſtator gives the *Perpetuity* of them to *Lancelot Hicks for his Life*; and afterwards, to *ſuch Son* as he ſhall have, lawfully iſſuing from his Body. Now it can never be ſuppoſed that the Teſtator meant to give *Lancelot* a Fee in the Land; *becauſe* he gives Him the Perpetuity of the Livings. And the *latter* Deviſe ſhall be conſtrued by and agreeable to the *former:* Conſequently, neither did He mean to give *Lancelot*'s Son a Fee, *becauſe* he gave Him the Perpetuity of the Livings.

As to taking the *Name*—No Caſe has been determined, on *that* Point. And *Lancelot Hicks* is here injoined to take the Name of *Robinſon*; tho' the Eſtate is expreſsly given to Him "for Life, and no longer."

By Mr. *Shepheard* of *Cambridgeſhire*'s Will, the Name of *Shepheard* is to be taken by the Tenant *for Life*. The Caſe of *Ibbetſon* v. *Beckwith*, reported in Mr. *Forreſter*'s *Caſes*, *pa.* 157, was a Deviſe to Teſtator's Mother for Life; after which, to his Nephew *Tho. Dodſon*, IF he will take his Name of *Beckwith*; if not, only 20*l.* Lord *Talbot* thought *that* alone to be *too ſlight* a Ground for a Conſtruction "that it ſhould be a Fee to *Tho. Dodſon*."

In order to make it an *Eſtate Tail*, the Expreſſion ought to be *ſuch* as will put it BEYOND *all Poſſibility of Doubt:* According to the Caſes of *Langley* v. *Baldwin*, *Shaw* v. *Weigh*, and *Bamfield* v. *Popham*.

The Caſe of *Coulſon* v. *Coulſon*, 2 *Str.* 1125. was *by way of* REMAINDER; not by giving the Father an Eſtate Tail; and is diſtinguiſhable from *all* thoſe that have been mentioned.

Second Queſtion (made by the Defendant's Counſel.)

The next Queſtion is, " *When* the Remainder ſhall veſt;" *viz.* Whether this contingent Remainder in the Son is to *veſt* upon the *Birth* of a Son, during the Life of *Lancelot Hicks*; or not till *upon* or *after the Death of Lancelot Hicks*, (the Father.) [*V. ante. p.* 43.]

" After the Deceaſe of *Lancelot Hicks*," (the Father,) are the Words of the Will. Which can ſuſpend it *no longer* than till the *Birth* of his FIRST *Son:* For, here are no Words to lead to a contrary Determination.

It muſt veſt, either before the immediate Eſtate ceaſes or *eo inſtante* that it does ceaſe. *Hutton* 119. *Napper* v. *Sanders. Chancery Caſes* 33. *Sackville* v. *Lockwood.*

Swinburn, part 7. *c.* 11. proves " that the Words ſhall " *not* relate to the Time of the *Teſtator's* DEATH; but to " the Time of MAKING *the Will.*" And at that time *Lancelot Hicks* had *no* Son; nay, nor even at the Time of the *Teſtator's Death.* A contingent Remainder muſt take Effect, as ſoon as any Perſon is born, who comes within the Deſcription: It can remain no longer contingent. Therefore *it here* VESTED *by the* BIRTH *of a Son*; *and was* THEN *and* THEREBY SATISFIED: The Eſtate for Life veſted in Him, on his Birth; and ceaſed with Him, on his Death: and then went over to the Defendant *William Robinſon*, the Deviſee over.

Indeed the Son *might* have been born between the making the Will, and the Death of the Teſtator; and have died before the Teſtator. *Thruſtout* v. *Peak & al'*, 1 *Strange* 12. And ſo, in the Caſe of *Lomax* v. *Holmden*, 2 *July* 1749, *in Canc'*. A Son was born and died, in the Lifetime of the Teſtator. But here, the Teſtator died *before* either of *Lancelot Hicks*'s Sons was born. Here the Elder Brother (*George*) was the firſt who could take, after the Death of the Teſtator.

And as to the Intention of the Teſtator—It is out of the preſent Caſe: For the INTENTION *of the Teſtator* CANNOT be purſued by ANY Conſtruction upon *this* Will, *without ſtraining the Rules of Law.*

Therefore the Plaintiff can take Nothing by it.

Reply.

The Plaintiff's Counſel replied, That the Word " *Son*" is here a Word of *Limitation.*

Some Words are Words of Purchaſe; and may, by *Circumſtances*, be turned into Words of Limitation: Others, are

primâ facie, Words of Limitation; and may, *by Circumſtances*, be *turned into* Words of Purchaſe. The Words "Son, Chil-"dren, Iſſue, and Heir," in a Will, where no Son is in Being at the Time of the Deviſe, are *nomina Collectiva*, and ſufficient (in a Will) to create an Eſtate of Inheritance.

Now, *here* ARE *ſuch Circumſtances* as ſhall determine the Word "*Son*" to be, HERE in this Will, a Word of *Limitation*.

The Caſe of *Taylor* v. *Sayer*, 41 *Eliz.* is not Law: Lord Ch. Juſtice *Hale* ſays, "it is too rank." [1 *Ventr.* 229.]

They agreed to the Caſe of *Trollop* v. *Trollop*; as the Words ſtand ſingly there: But alledged the Rule to be, "That the "INTENTION of the Teſtator ſhall *fix the Conſtruction* of "ſuch Words, as MAY be conſtrued *either* as Words of Li-"mitation, *or* of Purchaſe."

And if this Word "Son" be a Word of *Limitation*, then what hinders this from being an *Eſtate Tail?* And they inſiſted that this was ſo. And they ſaid that though here was a neceſſary Implication, yet they needed not to rely ſingly on its being an Eſtate-Tail by IMPLICATION: For here is even an EXPRESS *Eſtate-Tail* deviſed.

In the Caſe of *Shaw* v. *Weigh*, The Intention was plain: But the *apparent Intention* "to *give an Eſtate Tail* to the Iſſue," over-ruled it. And this is the laſt Caſe, in Point of Time.

In the Caſe of *Backhouſe* v. *Wells* it is not agreed, *which* of the two Expreſſions the Court went upon: *Viz.* "*without Im-*"*peachment* of Waſte;" or, "for his natural Life *only*."

Therefore they concluded that the Plaintiff is intitled to an Eſtate Tail, in the preſent Caſe.

2dly, The Son muſt be *ſuch* a Son as could *take*.

They ſaid, they never contended, that the Sons ſhould take as Joint-tenants, or Tenants in Common: They were to take in *Succeſſion*.

The Word "*Son*" may be here enlarged into "*Iſſue*". It does not at all appear that the Teſtator meant *Lancelot*'s *Eldeſt* Son, and his *Eldeſt Son* ONLY: On the contrary, His Intention appears to be the ISSUE MALE of *Lancelot*, *Generally*.

And the Caſes cited by the other Side do not prove their Point. For in 2 *Leon.* 35. *Leonard Lovelace*'s Caſe, the Word "*Eldeſt*" was expreſsly added to the Words "*Iſſue*

" *Iſſue Male*;" (the Deviſe being to the Father, and to his Eldeſt Iſſue Male:) So that it was the ſame as " Eldeſt *Son*;" and it better anſwered the Teſtator's Purpoſe, that the Children of this Deviſee ſhould take as *Purchaſers*.

As to the Determination ſaid to have been made in 1733 and 1734, of this Point, *upon this ſame Will*, by Sir *Joſeph Jekyll*, and Lord Chancellor *Talbot*; The Widow of the Teſtator there claimed *paramount* the Will; She brought a Bill to eſtabliſh her Jointure: And there was indeed a Croſs-Cauſe. But *Non conſtat, what Lancelot claimed*; nor does it appear how it was defended. However, it is plain, that the *preſent* Lord Chancellor does *not* reſt ſatisfied with theſe Opinions: Becauſe *He* has ſent it hither for the Opinion of *this* Court.

The Words, " Such Son" muſt let in *All* Sons; and cannot exclude ALL *Sons* BUT the Eldeſt. It was a contingent Remainder, that the Court will keep open, till there it a Neceſſity to determine it. And there is no Need to determine it, (for there is no Need that the Remainder ſhould veſt,) TILL *the Death* of the Tenant for Life: *Then* indeed it muſt veſt, *eo inſtanti*.

In *Hutton* 119. and in *Chancery Caſes* 33. It *was* an *Eldeſt Son:* Whereas here it is not neceſſarily an *originally Eldeſt* Son; but may be any *other* Son, who BECOMES *Eldeſt* before the contingent Remainder veſts.

ALL the Sons of *Lancelot* could *not* take, *unleſs* the Father took firſt: A *Poſthumous* Son certainly could not.

As to the contingent Remainder veſting—It is *enough* if it veſted *eo inſtanti* that the particular Eſtate determined.

And as to the Deviſe of the Perpetuity of the Advowſons, the latter Deviſe is not to be conſtrued *by the former:* But both the former and the latter Words are to be taken *together*, and a reaſonable Conſtruction made upon them, agreeable to the general Intention of the Teſtator.

Upon the whole, This is an Eſtate either in *Fee*, or in *Tail*; or at loweſt, for *Life*.

The JUDGES OF THIS COURT, on the 1ſt of *December* 1756, unanimouſly CERTIFIED to the Court of Chancery, in the Words following;

" We are of Opinion, That, Upon the true Conſtruction of the ſaid Will of the Teſtator *George Robinſon*, the ſaid *Lancelot Hicks* muſt, by *neceſſary Implication*, to *effectuate* the *manifeſt general Intent* of the ſaid Teſtator, be " conſtrued

" conſtrued to take an Eſtate in *Tail Male*, He and the Heirs " of his Body taking the Name of *Robinſon*; NOTWITH- " STANDING *the* EXPRESS Eſtate deviſed to the ſaid *Lan-* " *celot Hicks* for his LIFE and NO LONGER."

Note; The Courſe has always been, for the Judges not to give any *Reaſons*, *in Court*, upon a Caſe ſent out of Chancery for their Opinion. But the above Certificate ſeems carefully penned, to mark the Grounds upon which it was founded.

The Eſtate Tail is ſaid to veſt in *Lancelot Hicks*, the Father. The *manifeſt Intent* of the Teſtator, expreſſed by his Will, was, that the Eſtate ſhould *not* go over to his *Heir at Law*, till Failure of Iſſue Male of *Lancelot Hicks*.

The Difficulty was, how to mould an Eſtate *agreeable to the Rules of Law*, to effectuate the Teſtator's Intent; and to conſtrue his Senſe and Meaning into *apt* Words of *Limitation*.

If the Father could have taken an Eſtate for Life, and the Sons ſucceſſively an Eſtate in Tail Male, the whole Intention of the Teſtator would have been *better* anſwered: For, by *ſuch* Conſtruction, *All* the Words in the Will would have received their natural Senſe and Meaning, *without rejecting* any Words; and None ſhould be rejected, *unleſs* the Teſtator's Intent cannot be otherwiſe attained. But THAT could *not* be, by Law. An Eſtate to the Heirs Male of the Body of *Lancelot Hicks* is *implied*, though an Eſtate for Life only is *given* to Him; becauſe the Teſtator's Heir was not to take, *till Failure* of ſuch Heirs Male. But by Law the Teſtator could, by *no* Words, have made the Father Tenant for Life, and the Heirs Male of his Body *Purchaſers*.

If He had deviſed " to the Father for Life, Remainder to " the Son for Life, Remainder to the Heirs Male of the " Body of the Father;" Or " to the Father for Life, Re- " mainder to the Son, and the Heirs Male of the Body " of the Father:" In *either* of theſe Caſes, the *Father* muſt have taken an Eſtate in *Tail Male*. The Caſe put in *Lit. Sec.* 30. and the Determination mentioned in Lord *Coke*'s Comment upon that Section, (in *pa.* 26. *b.*) on the Gift " to *Roberge* and to the Heirs of *John de Mandevile* her " *late* huſband, on her Body begotten," are no Exception to this Rule: For, in *both* Caſes, the *Father* was DEAD at the Time of creating the Entail.

It is ſaid too, " That he muſt, by neceſſary Implication, " to *effectuate* the manifeſt *general* Intent of the Teſta- " tor,

" tor, be conſtrued to take an Eſtate in Tail Male; " NOTWITHSTANDING the *expreſs* Eſtate deviſed to " him, for his Life, and no longer."

Thoſe Words ſeem intended to expreſs the *governing Reaſon* in this Caſe, to have been the *manifeſt main Intent* of the Teſtator, collected from all the parts of his Will taken together; *without ſhaking* the authority of *Backhouſe* v. *Wells*, and other Caſes, which have laid a Streſs upon the Words " *only*," " *not otherwiſe*," or *like* Expreſſions, after an Eſtate for Life, together with other Clauſes and Circumſtances in Favour of the manifeſt Intent of a Teſtator, to make the Iſſue or Heir take as a Purchaſer deſigned by a Perſonal Deſcription.

This Certificate was confirmed in Chancery; and a Decree made accordingly.

ON APPEAL to the Houſe of Lords from that Decree, The Opinion of *All the Judges* was aſked. It was delivered by Lord Ch. Baron *Parker*, with the Reaſons at large: And they unanimouſly agreed with the above Certificate, upon the above grounds ſuggeſted thereby.

Whereupon the *Decree* was *affirmed* by the Lords, on the 14th of *February* 1758.

☞ REGULA GENERALIS.

Friday 26th November 1756. The Court declared a new Order concerning *Special Cauſes* in the Paper: Which was, in Subſtance, That all Cauſes ſhould come on to be argued, in the *ſame* Order, that they were entered; and that they ſhould *continue* to ſtand in the Paper, in the ſame Order, *till* they ſhould be argued, (without being entered anew:) And that no Cauſe ſhould be put off, without a ſpecial Application to the Court, upon ſome ſufficient Ground, before the Day upon which it ſtood in the Paper for Argument.

☞ *Note*;

It may not be amiſs, to mention a general Rule for *intitling* all Caſes ariſing upon ORDERS of REMOVAL: The Want of knowing, or the want of attending to which general Rule, has been the Occaſion of infinite Confuſion in tabling and citing Caſes of this Sort.

The conſtant Method of entering them in the *Rule-Book*, is to name the *King* as *Proſecutor*; and the Pariſh *laſt charged* with the Paupers, and conſequently *Appealing* to this Court, as *Defendants*. For inſtance—Two Juſtices remove a Pauper

a Pauper from *A.* to *B.* And *B.* appeals to the Seſſions. If the Seſſions *confirm* the Order, and *B.* brings the *Certiorari*, the Rule thereupon is intitled "*Rex* verſus *Inhabitantes de B.*" But if the Seſſions *diſcharge* the original Order, and conſequently *A. remains charged* with the Pauper, and brings a *Certiorari* to remove the Orders, then the Rule bears for its Title, "*Rex* verſus *Inhabitantes de A.*"

Rex *verſ.* Inhab. de Aythrop Rooding.

Monday, 29th *November*, 1756.

[Mr. Juſtice *Wilmot* was abſent; ſitting in Chancery as one of the Commiſſioners of the Great Seal.]

See this Caſe *abridged*, in the Table; and *at large* in the Quarto Edition of my SETTLEMENT CASES, No. 131. p. 312.

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† Farewell, Eſq; *verſ.* Chaffey and others.

† Page 54. [See the Note at the bottom of this Page.] The ſame Day.

THIS Cauſe was tried upon the Weſtern Circuit, the laſt Summer Aſſizes, before Mr. Serjeant *Willes*; who certified, "That the *Weight of the Evidence* was *againſt* the Verdict." But a *new Trial* was denied, upon the Nature of the Action, the *Value* of the Matter in Diſpute, and *other Circumſtances* of the Caſe. †

† *V. Ante. pa.* 11, 12. *Macrow*, v. *Hull* S. P. *and Poſt pa.* 664. *Dr. Burton* v. *Thompſon*, *M.* 1758. S. P.

Lord *Mansfield* ſaid, A NEW TRIAL ought to be granted, to attain REAL *Juſtice*; but *not* to gratify litigious Paſſions, upon every Point of *Summum Jus*; and cited *Smith* v. *Bramſton*, and *Smith* v. *Frampton* in 2 *Salk.* 644; and an anonymous Caſe there alſo mentioned, of *P.* 8 *W.* 3. *B. R.* and likewiſe *Smith* v. *Page*, *M.* 8 *W.* 3. *B. R. ibidem*; alſo *Deerly* v. *The Dutcheſs of Mazarine*, *H.* 8 *W.* 3. *B. R.* 2 *Salk.* 646. and *Sparks* v. *Spicer*, *H.* 10 *W.* 3. *B. R.* in the ſame Book, *pa.* 648. To which may be added, What is ſaid by the Court, in the Caſe of *Dunkly* v. *Wade*, *P.* 5 *Ann.* 2 *Salk.* 653.

In theſe Caſes, the Verdicts were againſt Evidence and the ſtrict Rule of Law, or obtained through Surprize: But the Court would not give a Second Chance of Succeſs to a *hard Action*, or an *unconſcionable Defence*.

Therefore

NOTE. The Pages of *this* Edition tally to the Pages of the *former* Edition, excepting *thoſe only* which immediately follow the *omitted* SETTLEMENT CASES.

Therefore the COURT, upon the *ſame Principles*, refuſed to grant a New Trial in the preſent Caſe, and diſcharged the Rule to ſhew Cauſe why there ſhould not be One.

Rex *verſ.* Joſeph Smith.

AN Indictment for a Nuiſance had been removed, by *Certiorari*, from the Quarter Seſſions in *Devonſhire*, into this Court, by the Defendant: Which Indictment was afterwards tried, and the Defendant was found Guilty. He then moved in Arreſt of Judgment: But his objections were overruled. After which, the Proſecutor moved for his Coſts; and obtained a Rule to ſhew Cauſe. And now Mr. Serjeant *Hewitt*, on Behalf of the Defendant, ſhewed Cauſe, "Why "the *Proſecutor* ſhould not have his *Coſts*, before the Recog- "nizance ſhould be diſcharged; and why it ſhould not be "referred to me, to tax ſuch Coſts."

His Cauſe was this, That *No Name* of any Perſon *as being* either the Party grieved or injured, or a *public Civil Officer*, is INDORSED upon the Indictment, according to the Directions of 5, † 6 *W. & M. c.* 11. *ſ.* 2 & 3. And he urged that *without* ſuch INDORSEMENT, no Coſts were payable to the Proſecutors.

† Page 55. † See the Note at the bottom of Page 53.

Mr. *Huſſey contra*, for the Proſecutor, acknowledged that there was no Name indorſed: But, at the ſame Time, inſiſted that an INDORSEMENT of the Name of the Proſecutor, as being the Party grieved or injured, or a civil Officer, is *not at all neceſſary*, in order to the Court's giving him Coſts; though the 2d Section does indeed *direct* the Recognizance to be certified into this Court, with the *Certiorari* and Indictment, and the Name of the Proſecutor (if he be the Party grieved or injured) or ſome public Officer to be indorſed on the Back of the Indictment.

He ſaid He had an AFFIDAVIT "That the Proſecutor "*was* a civil Officer, *&c.*" And the Words of the 3d Section of the Act "are that *if He* BE *ſo*, the Recognizance ſhall "not be diſcharged, *till* the Coſts ſhall be paid." But the Act does *not* ſay "That the Proſecutor ſhall *not* have his "Coſts, *unleſs* his Name be INDORSED."

Lord MANSFIELD: It is enough if it be proved "That "the Proſecutor was a Civil Officer, *&c.*" And here it *is* proved, by *Affidavit*: Which is ſufficient.

Rule made abſolute for the Proſecutor's having his Coſts, (to be taxed by Me, *ut ſupra,*) before the Recognizance ſhould be diſcharged.

Shadwell

Shadwell, Eſq; *verſ.* Angel, Eſq.

THIS was a long Litigation concerning the Regularity of a Judgment; which, on Mr. *Nares*'s Motion (*ex parte Def*') had been referred to the Maſter, who thought it irregular: And now Mr. *Norton*, (*ex Parte Quer*',) appealed to the Court, from the Maſter's Opinion.

The Queſtion depended upon the Meaning of a Rule of this Court, made *M.* 10 *Geo.* 2. 1736. and upon the Practice of the Court, purſuant to that Rule.

The Import of this Rule was, that upon Proceſs returnable the 1ſt or 2d Return of a Term, a Plaintiff may (in certain Caſes) deliver a Declaration *de benè eſſe*, at the Return of the Proceſs; *with* NOTICE "for the Defendant to plead "within *Eight Days after Delivery* of the Declaration:" And if the Defendant ſhall not file Common Bail, and plead within ſuch Eight Days after, *&c.* the † Plaintiff (having firſt † Page 56. filed Common Bail for ſuch Defendant according to the then late Act for preventing frivolous and vexatious Arreſts,) may ſign Judgment for want of a Plea, a Rule to plead being duly entered.

The preſent Fact was, That the Proceſs was returnable on *Saturday* 15th *November* (the 2d Return of the Term.) The Declaration, with Notice "to plead in 8 Days," was LEFT *in the* Office on *Monday* the 24th of *November*: And upon the Defendant's not pleading within the 8 Days, or even before the Time of ſigning the Judgment; the Plaintiff on the 3d of *January* (6 Weeks afterwards) filed Common Bail for the Defendant, and (a Rule to plead having been duly entered) ſigned Judgment *upon the* SAME Day.

The Maſter, Mr. *Clarke*, thought this to be irregular; For that when the Defendant was once in Court, the Plaintiff ought to proceed againſt him *as being* in Court: By which Expreſſion he ſeemed to mean, either that the Plaintiff ſhould deliver a Declaration *afreſh*; or that He ſhould give a *freſh* Rule to plead.

And Mr. *Nares* (in Support of the Maſter's Opinion) urged that when the 8 Days (the Time for pleading) are out, the *de benè eſſe* Declaration is at an End. And he mentioned a Caſe of *Llewellin* v. *Skyrm*, as in Point.

But Mr. *Norton* denied this; and ſaid that the 8 Days were *not* out; but the Declaration *de benè eſſe* was delivered *within*

within Time (though not indeed till the 9th Day;) becauſe there were *two Sundays* included, *viz.* 16th and 23d of *Nov.* And that the Plaintiff might have ſigned his Judgment on *Tueſday* the 25th.

Maſter *Clarke* was, at firſt, inclined to think that the *Sunday* was no Excuſe; and that this was not a ſufficient Reaſon to allow the Plaintiff Time till the 9th Day, for delivering the Declaration *de benè eſſe*. But all the Officers thought otherwiſe; And the Court ſeemed to think ſo too: Whereupon Maſter *Clarke* ſeemed to give that Point up.

The COURT were of Opinion that the Judgment was regular.

Lord *Mansfield* was clear, that *No further* Notice (beſides that given on delivering the Declaration *de benè eſſe*) was neceſſary.

Mr. Juſt. *Deniſon* ſaid the Defendant had 8 Days AFTER *the Delivery* of the Declaration *de benè eſſe*, *whenever* it may be delivered (either ſooner or later.)

† Page 57. † And this was *left in the Office*, (which He held to be a good Delivery,) on the 24th, which was *within Time*; And the Defendant did *not* plead within 8 Days: Whereupon, the Plaintiff files Common Bail for Him, upon the 3d of *January*; and ſigns Judgment the *ſame* Day: Which is regular; For the Rule is *complied with*, and the Defendant is not at all hurt; on the contrary, He has had *longer* Time than he was intitled to.

Mr. Juſt. *Foſter*. The whole Objection is "That the "Plaintiff has not proceeded with ſo much Speed as He *might* "have done:" For he *might* have ſigned his Judgment on the 25th of *November*. The Defendant might have filed Common Bail for *Himſelf*, if he had thought proper: And then he might have had a freſh *Rule* to plead.

By the COURT unanimouſly, The Rule of Reference to Maſter *Clarke*, for Irregularity in this Judgment, was diſcharged.

MEMO-

MEMORANDUM.

The new Lord Chief Juſtice, at his firſt ſetting out, inſtituted a *different Method* of going through the MOTIONS *at the Bar*, from that which had been uſually (and indeed almoſt univerſally) practiſed heretofore: Which new Method was not only advantageous to the younger Part of the Barriſters, but alſo exceedingly convenient to the Suitors, as it took away that Delay to Buſineſs which aroſe *from the* unreaſonable Preference hitherto given to Gentlemen within the Bar. For, the *repeated* Pre-Audience, hitherto allowed them, had thrown almoſt the whole Buſineſs into their Hands: Which, as they were intitled to move only once in a Day, could not be ſufficiently diſpatched.

The Courſe had been, ever ſince I remember, and was in Lord Ch. Juſt. *Holt*'s Time, (as the late Mr. Juſtice *Page* has often told me,) "*to* BEGIN, EVERY DAY, with the "*Senior* Counſel within the Bar, and then to call to the next "Senior, in Order, and ſo on, as long as it was convenient "to the Court to ſit; and to proceed again in the ſame "Manner, upon the *next*, and EVERY *ſubſequent* Day; al-"though the Bar had not been half, or perhaps a quarter "gone through, upon any One of the former Days: So that "the Juniors were very often obliged to attend in vain, "*without being able* to bring on their Motions, for many ſucceſſive Days."

This was the *ſettled* and *general* Rule: Though perhaps the Judges, out of mere Compaſſion to the Juniors, would 2, or 3 † Times in a Term, give them Leave, to move, upon the next Day, ſuch Motions as were real *Remants* of the former Day. † Page 58.

Whereas Lord *Mansfield* profeſſed and moſt punctually practiſed the *going* QUITE THROUGH the Bar, even to the youngeſt Counſel, before he would begin again with the Seniors; even though it ſhould happen to take up two or three or *more* Days, before all the Motions which were ready at the Bar upon the firſt Day, could be heard.

The End of *Michaelmas* Term 30 *Geo.* 2. 1756.

Hilary

*P. 59.

* Hilary Term

30 Geo. 2. B. R. 1757.

(Lord Commiſſioner *Wilmot* abſent, in Chancery.)

Kilwick *verſ.* Maidman.

Monday 24th January, 1757.

TIME was given by a Judge's Order to plead; *(viz.* until 2 Days before the Eſſoign-Day of this preſent Term;) on the uſual Terms, "of pleading *iſſuably*, *&c.*" This Order was not obtained till after the Four-Days Rule for pleading was expired. BEFORE *the* Term, and *within* the Time allowed by the Judge's Order, the Defendant pleaded a Plea of *Tender*; Which Plea was intitled (as it was agreed that it regularly might,) as of the *preceding* Term.

Mr. *Aſpinall* moved, *ex parte Quer'*, to ſet *aſide* the Plea, with Coſts, as irregular; and for Leave to ſign Judgment: And He cited 1 *Barnes* 246. *Daevenhill* v. *Barrit*, in Point.

Mr. *Winn pro Def.* ſhewed Cauſe; *viz.* That it was a *fair honeſt Plea*, in its own Nature: And that it was *within Time*, not being after Imparlance, but AS *of the* LAST *Term*; And alſo that it was an ISSUABLE *Plea*, within the Meaning of the Judge's Order: Though He acknowledged that a Plea in *Abatement*, (though in Strictneſs indeed iſſuable,) would *not* be ſo; becauſe it tended to delay the Plaintiff.

The COURT concurred entirely in what Mr. *Winn* had urged in Support of the Regularity of the Plea: And the Motion was denied.

Taylor,

† Taylor, ex dimiſſ. Atkyns, Eſq; *verſ.* Horde, Eſq; & al'. † Page 60.

IN Ejectment brought in *Michaelmas* Term, 1752, by *John Atkyns*, Eſq; (in the Name of *Cyprian Taylor*) againſt *Robert Atkins*, Eſq; the Heir at Law, and Others; Upon the General Iſſue pleaded, and Iſſue joined thereon and tried at the Bar of this Court, the Jury find a Special Verdict: Which was, in Subſtance, as follows. Tueſday 25th Jan. 1757.

That Sir *Robert Atkyns* the Elder, Knight of the *Bath*, on 8th *June* 1669, was (amongſt divers other Meſſuages, Lands, Tenements, &c. in *Glouceſterſhire*,) ſeiſed in Fee of the Manor of *Lower Swell* and the other Premiſſes in Queſtion; and being ſo ſeiſed, made and executed Three ſeveral Indentures, (which are ſet out in the Special Verdict: One of which is dated on the 11th, and the two others on the 12th of *June* 1669.

By One of theſe Indentures, which was dated on the 12th of *June* 1669, (which the Counſel on both Sides, for Diſtinction's Sake, called the *leſſer* Deed,) made between Sir *Edward Atkyns*, Knt. One of the Barons of the Exchequer, Sir *Robert Atkyns*, Knight of the *Bath*, Solicitor General to the Queen, and Son and Heir apparent of the ſaid Sir *Edward*, and Dame *Mary* (Wife of the ſaid Sir *Robert*) *Atkyns*, of the one Part; and Sir *Edward Carteret*, Knt. and *John Lowe*, Gentleman, of the other Part; It is witneſſed that in Conſideration of a Marriage thentofore had and ſolemnized between the ſaid Sir *Robert Atkyns* and Dame *Mary* his Wife, and of her *releaſing and acquitting a former Jointure* to Her made before Marriage, and of a *new Proviſion* to be had and made for Her the ſaid Dame *Mary*, for and in the Nature of a Jointure, in Bar and Recompence of her Dower and Thirds at the Common Law, in Caſe ſhe ſhould happen to ſurvive and over-live the ſaid Sir *Robert Atkyns* her Huſband, He the ſaid Sir *Robert Atkyns* did thereby covenant and grant to and with the ſaid Sir *Edward Carteret* and *John Lowe*, That He the ſaid Sir *Edward Atkyns*, and the ſaid Sir *Robert Atkyns* and Dame *Mary* his Wife, ſhould and would, before the End of *Michaelmas* Term then next enſuing, levy and acknowledge before the Juſtices of the Court of Common Pleas at *Weſtminſter*, One or more Fine or Fines *Sur Conuſance de Droit come ceo*, &c. unto the ſaid Sir *Edward Carteret* and *John Lowe*, with Proclamations, of the ſaid Manor of *Lower Swell* and the other Premiſſes in Queſtion: Which ſaid Fine or Fines ſo as aforeſaid or in any other Sort to be had, levied and executed, of the ſaid Manor and Premiſſes alone, or together with any other Lands, Tenements or Hereditaments, by or between the Parties

† Page 61. Parties to the ſaid Indenture † or any of them, alone or together with any other Perſon or Perſons, were to be and enure, and were thereby declared to be and enure, as to the ſaid Manor and all other the Premiſſes, To the Uſe of the ſaid Sir *Robert Atkyns* for Life, without Impeachment of Waſte; and from and after his Deceaſe, To the Uſe of the ſaid Dame *Mary* for Life for her Jointure and in Bar of her Dower; and from and after the Deceaſe of the ſaid Sir *Robert* and Dame *Mary*, To the Uſe of Sir *Robert Atkyns*, Knt. Son and Heir apparent of the ſaid *Robert*, and the *Heirs Male of the Body* of the ſaid Sir *Robert* the Son, *on the Body of Lovis Carteret* his intended Wife lawfully to be begotten; and for Default of ſuch Iſſue, to the Uſe of the *Right Heirs* of the ſaid Sir *Robert* the *Father* for ever.

And the ſaid Sir *Edward Atkyns* and Sir *Robert* the Father did by this Deed covenant with the ſaid Sir *Edward Carteret* and *John Lowe* and their Heirs, That in Caſe any Defect ſhould happen in the ſaid Fine and that Aſſurance, Or in Caſe there ſhould not be ſome good Conveyance in the Law made according to the Intent of that Indenture, ſo that by Reaſon of ſuch Defect or Failure of ſuch Conveyance and Aſſurance in Law, the ſaid Manor and Premiſſes or any Part or Parcel of them ſhould not, before the thirtieth Day of *November* then next enſuing, be ſufficiently conveyed according to the Intent of the ſaid Indenture, then they the ſaid Sir *Edward Carteret* and *John Lowe* and their Heirs, and all and every other Perſon and Perſons and their Heirs, ſtanding or being ſeiſed, or which ſhould ſtand or be ſeiſed of and in the ſaid Manor and Premiſſes, ſhould and would from Time to Time and at all Times from thenceforth for ever ſtand and be ſeiſed of and in the ſaid Manor and Premiſſes, or ſo much and ſuch Part and Parts thereof whereof or concerning which any ſuch Defect ſhould happen to be, to the Uſes Behoofs Intents and Purpoſes therein before declared, limited and contained, according to the true Intent and Meaning of the ſaid Indenture, and to *none other Uſe*, Intent or Purpoſe whatſoever.

One other of theſe three Indentures was a Leaſe, dated 11th *June* 1669: And the Remaining One was a Releaſe, dated 12th *June* 1669. This *Releaſe* bore the very *ſame Date* with the Deed already recited (called the leſſer Deed:) And the Counſel on both ſides agreed in calling *this Deed of Releaſe* (for Diſtinction's Sake) the *greater* Deed, as this contained the Settlement of the whole Eſtate.

By theſe Indentures of Leaſe and Releaſe, dated 11th and 12th *June* 1669, the Releaſe being Tripartite, and made between the ſaid Sir *Edward Atkyns*, the ſaid Sir *Robert* the Father and Dame *Mary* his Wife, *Philip Sheppard*, Eſq; Sir *Clement*

ment Farnham Knt. and *Edward Atkyns* Eſq; (ſecond Son of the ſaid Sir *Edward Atkyns*,) of the firſt Part; the Right Honourable Sir *George Carteret* Knt. and Bart. Vice-Chamberlain of his Majeſty's Houſehold, and One of his Majeſty's moſt Honourable Privy Council, the ſaid Sir *Edward Carteret* and the ſaid *John Lowe*, the Right Honourable *Edward Montagu*, commonly called Lord *Hinchinbrooke* (Son and Heir apparent of the Right Honourable the Earl of *Sandwich*,) Sir *Philip Carteret* Knt. (Son and Heir apparent of the ſaid Sir *George Carteret*,) and *Edward Swift*, Eſq; of the ſecond Part; and the ſaid Sir *Robert Atkyns*, Knt. (the Son and Heir apparent of the ſaid Sir *Robert Atkyns*,) and *Lovis Carteret* (one of the Daughters of the ſaid Sir *George Carteret* and of Dame *Elizabeth* his Wife,) of the third Part; It is witneſſed that in Conſideration of a Marriage thentofore had and ſolemnized between the ſaid Sir *Robert Atkyns* the Father and Dame *Mary* his Wife, and alſo of a Marriage then ſhortly to be had and ſolemnized between the ſaid Sir *Robert Atkyns* the Son and the ſaid *Lovis Carteret*, and of the Sum of 6500*l.* *paid to Sir Robert the Father* by the ſaid Sir *George Carteret*, for the Marriage Portion of the ſaid *Lovis Carteret*, and of 5*s.* a-piece to the ſaid Sir *Edward Atkyns*, Sir *Robert Atkyns* the Father, *Philip Sheppard*, Sir *Clement Farnham*, and *Edward Atkyns*, paid by the ſaid Sir *Edward Carteret* and *John Lowe*, and for a Proviſion to be had and made *to and for the ſaid Dame Mary* (Wife of the ſaid Sir *Robert Atkyns* the Father,) for and in the nature of a *Jointure*, in Bar and Recompence of her Dower and Thirds at the Common Law; and alſo for a Proviſion for the ſaid *Lovis Carteret*, for and in Nature of a Jointure, in Bar and Recompence of her Dower and Thirds at the Common Law; and for ſettling All the Manors, Lands, Tenements, and Hereditaments thereinafter mentioned, to the ſeveral and reſpective Uſes, upon the Truſts, to the Intents and Purpoſes, and with, under and ſubject to the Proviſoes Declarations Limitations and Agreements thereinafter declared; The ſaid Sir *Edward Atkyns* and Sir *Robert* the Father did grant releaſe and confirm unto the ſaid *Sir Edward Carteret* and *John Lowe* and their Heirs, the ſaid Manor of *Swell* and other the Premiſſes in Queſtion (as deſcribed in the leſſer Deed) and ſeveral other Manors Lands and Hereditaments therein mentioned, To hold the ſaid Manor of *Swell* and other the Premiſſes in Queſtion, to the ſaid Sir *Edward Carteret* and *John Lowe* and their Heirs, to the ſeveral Uſes therein mentioned; which Uſes, (as to the ſnid Manor of *Swell* and other the *Premiſſes in Queſtion*,) are the ſame as thoſe before ſet forth in the leſſer Deed; *viz.* *P. 62.

To the Uſe of Sir *Robert* the Father, for Life, without Impeachment of Waſte;

* P. 63. * Remainder, as to the ſaid Premiſſes (except Timber-Trees,) to Dame *Mary* for Life, for her Jointure, and in Bar of Dower;

Remainder to Sir *Robert* the Son, and the Heirs Male of his Body by the ſaid *Lovis Carreret*;

Remainder to the right Heirs of Sir *Robert* the Father.

And ſeveral other Parts of the Eſtates were limited thereby, to Sir *Robert* the Son, for Life; Remainder to Truſtees, to preſerve contingent Remainders; Remainder to the ſaid *Lovis Carteret* for Life, for her Jointure and in Bar of Dower; and upon the Iſſue of the ſaid intended Marriage, in ſtrict Settlement.

In which Indenture of Releaſe is contained a Proviſo, in the following Words—

" Provided always that it ſhall and may be lawful to and " for the ſaid Sir *Robert Atkyns* the Father, the ſaid Sir " *Robert Atkyns* the Son, and the ſaid *Lovis Carteret*, re- " ſpectively, when they are or ſhall be reſpectively ſeiſed " in Poſſeſſion of the Freehold of ſuch of the Premiſſes as " by Virtue of and according to the Limitations aforeſaid " are reſpectively limited to them for their reſpective Lives, " by their reſpective Deed or Deeds in Writing ſealed and " delivered in the Preſence of two or more credible Wit- " neſſes, *to make any Leaſe or Demiſe*, Leaſes or Demiſes, of " all or any of the ſaid Premiſſes whereof they ſhall be ſo re- " ſpectively ſeized in Poſſeſſion for Life as aforeſaid, (Except " of the Capital Meſſuage of *Sapperton* aforeſaid, and the " ſaid Lodge in *Pinbury* Park aforeſaid) unto any Perſon or " Perſons, for One, Two, or *Three Lives* in Poſſeſſion Re- " verſion or Remainder, to end or determine upon the Death " of One Two or Three Perſons, Or for the Term of 21 " Years abſolute; So as there be not, in the reſpective Pre- " miſſes or any Part thereof, any Eſtate exceeding the Term " or Time of *three Lives* or 21 Years, in being at the ſame " Time; and ſo as ſuch reſpective Leaſes be not made with- " out Impeachment of Waſte; *And* SO AS *the* USUAL " RENTS of ſuch of the Premiſſes reſpectively as ſhall be ſo " leaſed or demiſed upon Fines, And the BEST *Rents that* " CAN BE *reaſonably gotten* for ſuch of the Premiſſes re- " ſpectively as ſhall be ſo leaſed or demiſed without Fines, as " *reſpectively* RESERVED upon *every* ſuch reſpective Leaſe " or Leaſes Demiſe, or Demiſes, *to be* PAYABLE DURING " *the reſpective Terms* in the ſaid reſpective Leaſes or Demiſes " to be contained; Any Thing herein before contained to the " contrary notwithſtanding."

And

‡ And another Proviſo is therein alſo contained, in the following Words, *viz.* ‡ P. 64.

" Provided alſo that it ſhall and may be lawful to and for " the ſaid Sir *Robert Atkyns* the Father, at any Time or " Times during his natural Life, *After* the Deceaſe of the " ſaid Dame *Mary* his Wife, by any Writing or Writings " indented, under his Hand and Seal, teſtified by two or " more Witneſſes, to grant, aſſign, limit or appoint the ſaid " Manor of *Swell inferior alias Nether Swell*, and the Lands " Tenements and Premiſſes in *Swell inferior* otherwiſe *Nether* " *Swell*, *Upper Swell*, and *Stow in the Would*, and in either " or any of them, or ſuch Parts and Parcels thereof as He " ſhall think fit, unto or to the Uſe *of ſuch Woman or Women* " as He the ſaid Sir *Robert Atkyns* the Father *ſhall marry or* " *take to Wife*, after the Deceaſe of the ſame Dame *Mary* his " now Wife; for and during the Term of the *natural Life* or " Lives of ſuch Wife or Wives only, for her or their Jointure " or Jointures; Any Thing herein contained to the Contrary " thereof in any wiſe notwithſtanding."

And by another Proviſo in this Deed, the like Power is given to Sir *Robert* the Son, " to make a Jointure of all " or any of the Lands thereby limited to *Lovis Carteret* " for her Jointure, on any *future* Wife or Wives whom He " ſhould marry, after the Death of the ſaid *Lovis Carteret* " without Iſſue."

And by the ſame Deed, Sir *Robert* the Father covenants with Sir *George Carteret*, That Sir *Edward Atkyns*, He, and Dame *Mary* his Wife, would, before the End of *Michaelmas* Term then next, levy one or more Fine or Fines *ſur Conuſance de droit*, &c, with Proclamations, of the Premiſſes contained in this Indenture, unto the ſaid Sir *Edward Carteret* and *John Lowe*: Which, it was thereby declared, ſhould be and enure to the ſeveral and reſpective Uſes, upon the Truſts, and to the Intents and Purpoſes, and with, under and ſubject to the Proviſoes Declarations and Agreements therein before declared limited and expreſſed concerning the ſame. And reciting " that Sir *Clement Farnham* and *Edward Atkyns* " were poſſeſſed of the Premiſſes in Queſtion, or ſeveral Parts " thereof, for ſeveral Terms of Years then in Being, in " Truſt for Sir *Robert* the Father," It was thereby declared and agreed by Sir *Robert* the Father, That Sir *Charles Farnham* and *Edward Atkyns* ſhould ſtand poſſeſſed of the Premiſſes comprized in the ſaid Terms, during the Reſidue thereof, Upon Truſt and to the Uſe and Benefit of the Perſon and Perſons to whom the Premiſſes (by Virtue of the Limitations therein) ſhould belong.

* P. 65. * The Jury found that the firſt of the ſaid Indentures was executed by Sir *Edward Atkyns*, Sir *Robert Atkyns* the Father and Dame *Mary* his Wife, and *John Lowe*; The ſecond of the ſaid Indentures was executed by Sir *Edward Atkyns*, Sir *Robert* the Father, *Philip Sheppard*, Sir *Clement Farnham*, and *Edward Atkyns* Eſq; And the ſaid Indenture of Releaſe, by Sir *Edward Atkyns*, Sir *Robert* the Father, Dame *Mary* his Wife, Sir *Clement Farnham*, *Edward Atkyns*, Eſq; Sir *George Carteret*, Sir *Philip Carteret*, *Edward Swift*, Sir *Robert Atkyns* the Son, and *Lovis Carteret*; and that the Leaſe for a Year was executed before the Releaſe.

That in *Trinity* Term 1669, a Fine was levied; wherein the ſaid Sir *Edward Carteret* and *John Lowe* were Plaintiffs, and the ſaid Sir *Edward Atkyns*, Sir *Robert* the Father and Dame *Mary* his Wife Deforciants, of the Premiſſes in Queſtion, amongſt the ſaid other Lands contained in the greater Deed: But no Fine was ever levied of the Lands contained in the little Deed only.

Afterwards, on the 6th of *July* 1669, Sir *Robert* the Son was married to the ſaid *Lovis Carteret*.

Dame *Mary* (the Wife of Sir *Robert* the Father, *died* on 2d *March* 1680.

After which, *viz.* on 26th *April* 1681, Sir *Robert* the Father, being ſeiſed of the Premiſſes in Queſtion, as of Freehold, for the Term of his natural Life, without Impeachment of Waſte, (and being then on the Point of marrying a ſecond Wife, Mrs. *Ann Dacres*,) duly executed an Indenture under his hand and Seal, atteſted by three Witneſſes, bearing Date the ſame 26th of *April* 1681, and made between Himſelf of the one Part, and Sir *Robert Dacres* Knt. *John Dacres* and *Ann Dacres* Spinſter (Siſter of Sir *Robert Dacres* and *John Dacres*) of the other Part: By which Indenture (after reciting the abovementioned Indenture of Releaſe Tripartite of the 12th of *June* 1669, and the Power thereby reſerved "for the ſaid Sir *Robert Atkyns* the Father, after the Death "of Dame *Mary*, to limit all or any Part of the Manor and "Premiſſes in Queſtion, to any future Wife or Wives He "ſhould happen to marry, for the Term of the natural Life "or Lives of ſuch Wife or Wives only; for her or their "Jointure or Jointures,") it is witneſſed that in Conſideration of the then intended Marriage between the ſaid Sir *Robert Atkyns* the Father and the ſaid *Ann Dacres* and of her Marriage-Portion, The ſaid Sir *Robert Atkyns* the Father, IN PURSUANCE *of the ſaid Power to Him reſerved*, and of all and every Power and Authority whatſoever, did grant aſſign limit and appoint the ſaid Manor of *Swell* and other the Premiſſes in Queſtion

† Queſtion unto the ſaid ANN DACRES, *for and during the Term of her* NATURAL LIFE, for her Jointure, and in Bar and Recompence of her Dower and Thirds at the Common Law. † Page 66.

On 28th *April* 1681, the ſaid Sir *Robert Atkyns* the Father married the ſaid *Ann Dacres*.

On 31ſt *May* 1698, Sir *Robert Atkyns* the Father, being ſeiſed of the Premiſſes in Queſtion, as of Freehold for Life without Impeachment of Waſte, executed an Indenture of *Leaſe*, under his Hand and Seal, atteſted by 3 Witneſſes, dated on the ſame 31ſt Day of *May* 1698, and made between Himſelf of the one Part, and *Thomas Dacres* Eſq; *Robert Dacres* Gent. and *John Dacres* Gent. (the 3 Sons of the before named *Sir Robert Dacres* Knt. and Nephews of Dame *Ann Atkyns* then Wife of Sir *Robert Atkyns* the Father) of the other Part. This Indenture of Leaſe recites the Indenture Tripartite of Releaſe of the 12th of *June* 1669; Whereby Sir *Edward Atkyns* and Sir *Robert Atkyns* the Father did (amongſt other Lands) grant releaſe and confirm to the ſaid Sir *Edward Carteret* and *John Lowe* and their Heirs, the ſaid Manor of *Swell inferior* otherwiſe *Nether Swell*, with the Appurtenances, and all thoſe Rents of Aſſize of the Free Tenants of the ſaid Manor extending to One Halfpenny and One Pound of Pepper; and all the Rents of Cuſtomary Tenants of the ſaid Manor; and the Capital Meſſuage and Farm of the *Bold*; and the Park called *Swell Park*, otherwiſe *Abbot's Wood*; and all and all manner of Tenths or Tithes of the ſaid Park; and the Barcary or Sheep-houſe called *Gannow*, and the Grounds or Cloſes of Meadow or Paſture adjoining or belonging thereto; and the Water-Mill called *Bold Mill*, with the Dams, Streams, Waters, Attachment, Fenders, Soak, Suit, Mulcture, Griſt and Appurtenances thereunto belonging; All the Tolns of the Cuſtomary Tenants of the ſaid Manor, and all and all manner of Tenths and Tithes of all the Premiſſes whatſoever, which unto the late diſſolved Monaſtery of *Hales* did belong; All that Common of Paſture for 400 Sheep and 20 Beaſts, upon the Hills and Fields of *Nether Swell*, at all Times in the Year except in the open Time, and in the open Time Common of Paſture within the ſaid Fields for all Manner of Beaſts without Number Rate or Stint; and the ſeveral Paſtures called *Murden Leaſows*; all that Barcary or Sheep-houſe within the ſaid Paſture; all that Paſturage or Feeding for 600 Sheep, or for more or leſs at the Will and Pleaſure of the Tenant of the ſaid Paſtures called *Murden Leaſows* for the Time Being, in and upon the Demeſne Lands Waſte Lands and other Lands belonging to the ſaid Farm of the *Bold* or elſewhere, in ſuch ample Manner as the late Abbot of the ſaid diſſolved Monaſtery of *Hales* aforeſaid and his Predeceſſors had kept and occupied the ſame within the Manor of *Swell* aforeſaid; All thoſe Grounds in *Nether Swell*

† Page 67. † *Swell* aforeſaid theretofore in the Tenure of *John Winſmore* or his Aſſigns; All that Half-Acre of Land in *Nether Swell* ſometime in the Tenure of the Curate of the Church of *Stowe* in the ſaid County of *Glouceſter*; All that Fiſhing of the River or Water of the whole Manor of *Nether Swell*, with all Profits and Commodities to the ſame belonging; All thoſe Portions of Tithes whatſoever, and all and all manner of Tithe of Corn Grain Blade Sheaf Hay Wool Lambs Paſture and other Tenths and Tithes whatſoever in and upon the Premiſſes or any Part of them growing renewing or increaſing; (being the Premiſſes in Queſtion;) To the ſeveral Uſes by the ſaid Indenture limited as aforeſaid: And it alſo recites the Power to the ſaid Sir *Robert Atkyns* the Father, "for leaſing the Premiſſes," as it is ſet forth in the ſaid Indenture. Then it is witneſſed by this Indenture of Leaſe, That the ſaid Sir *Robert Atkyns* the Father, in Conſideration of the *Rent* thereby reſerved, IN PURSUANCE *of the Power to him reſerved* in and by the ſaid recited Indenture, and by Virtue thereof *and of* ALL AND EVERY *Power and Authority whatſoever*, did, by that his preſent Writing indented, under his Hand and Seal, teſtified by the ſeveral Witneſſes whoſe Names are thereupon indorſed, demiſe leaſe grant and to Farm let, to the ſaid *Thomas Dacres Robert Dacres* and *John Dacres* and their Aſſigns, the ſaid Manor, and all and ſingular the ſaid Lands, Tithes, Tenements, Hereditaments and Premiſſes, with their and every of their Rights Members and Appurtenances, in *Swell inferior* otherwiſe *Nether Swell*; AND *all and every the* RENTS RESERVED *upon any Leaſes or Grants*; To hold to them the ſaid *Thomas Robert* and *John Dacres*, from the making thereof, for and during the *natural Lives* of them the ſaid *Thomas*, *Robert* and *John Dacres* and the Life of the LONGER LIVER *of them*; YIELDING AND PAYING THEREFORE, during the ſaid Term, unto the ſaid Sir *Robert Atkyns* Parto thereto, and after his Deceaſe, to ſuch Perſon or Perſons reſpectively to whom the ſaid Manor and Premiſſes were limited, according to their reſpective Eſtates and Titles, the *Yearly Rent of* THREE HUNDRED AND THREESCORE *Pounds* at *Michaelmas* and *Lady-day*, by even and equal Portions.

In which ſaid Indenture of Leaſe is contained a Clauſe, in theſe Words; *viz.* "*The* TRUE INTENT AND MEAN-"ING *of this Eſtate or Term for Lives*, ſo hereby granted and "made to the ſaid *Thomas Dacres Robert Dacres* and *John* "*Dacres* and the Survivor of them, being TO PRESERVE "*the ſaid Remainder* ſo limited in the Premiſſes by the ſaid "recited Indenture, TO *the Right Heirs of the ſaid Sir Ro-*"*bert Atkyns Party to theſe preſents*, AND TO SUCH PERSON "OR PERSONS TO WHOM *the ſaid Sir Robert Atkyns Party* "*to theſe preſents ſhall* ANY WAY DISPOSE OF *the ſame*, FROM "BEING

" BEING BARRED *by any* RECOVERY *to be ſuffered, or by any* " *other Act to be attempted or done for the* BARRING *of the ſame.*"

‡ On 8th *June* 1698, *John Dacres, one of the Leſſees* in the laſt above-mentioned Indenture of Leaſe, *alone*, executed a *Letter of Attorney*, under his Hand and Seal, reciting the ſaid laſt Indenture of Leaſe, and impowering and authorizing *Thomas Barker*, Gent. as his Attorney, *to take Livery and Seiſin* of the Premiſſes laſt above-mentioned, from the ſaid Sir *Robert Atkyns* the Father; *for* HIMSELF (the ſaid *John Dacres*) *and* FOR *the ſaid Thomas and Robert Dacres* and every of them, *in* THEIR *Names and for their Uſe*, according to the Purport and true Meaning of the ſaid recited Indenture of Leaſe; and to enter and take Poſſeſſion of the ſaid Manor and Premiſſes in the ſaid Indenture contained, *to the Uſe of* THEM AND EVERY *of them*; He the ſaid *John Dacres* allowing of all and every the Act and Acts ſo done by the ſaid Attorney, to be as effectual and ſufficient in Law, as if He had been perſonally preſent and had done the ſame. ‡ Page 68.

On 5th *July* 1698, Sir *Robert Atkyns* the Father, being ſo ſeiſed as aforeſaid, and then in the actual Poſſeſſion of the ſaid Manor and Premiſſes, did, in his own Perſon, *deliver* Seiſin and Poſſeſſion thereof *unto the ſaid Thomas Barker*, TO THE USE *of the ſaid* THOMAS ROBERT AND JOHN *Dacres and of* EVERY *of them*, and of the Survivor of them, according to the Purport and true Meaning of the ſaid Indenture; He the ſaid *Thomas Barker* being authorized and appointed, by a Letter of Attorney under Hand and Seal of the ſaid *John Dacres*, and by Him duly executed, " for Him and to his Uſe " and in his Name, AND *for the ſaid* THOMAS AND ROBERT *Dacres and to* THEIR *Uſe and in* EVERY OF THEIR " *Names*, to take and receive the ſaid Livery and Poſſeſſion " of the ſaid Capital Meſſuage Manor and Premiſſes, accordingly." As by an Indorſement on the ſaid Letter of Attorney [which is ſet out in the Verdict] appears.

But the Jury found, that the ſaid *Thomas Dacres*, *Robert Dacres* and *John Dacres*, the Leſſees named in the laſt mentioned Indenture, or either of them, NEVER WERE IN POSSESSION of the Premiſſes in Queſtion, otherwiſe than by the ſaid Livery and Seiſin ſo given by the ſaid Sir *Robert Atkyns* the Father as aforeſaid; And that they or either of them *did* NOT *receive or pay any* RENT for or in reſpect of the ſaid Premiſſes; and that the ſaid *Indenture of Leaſe was* NOT FOUND IN THE CUSTODY *of Thomas Dacres the ſurviving Leſſee*, at the Time of his Death.

On 17th *May* 1708, Sir *Robert Atkyns* the Father, being ſo ſeiſed of the ſaid Premiſſes and of the Remainder and Reverſion thereof as aforeſaid, made his Will, dated the ſame 27th Day of *May* 1708, atteſted by four Witneſſes; And thereby

‡ Page 69. ‡ thereby confirmed his Wife's Jointure; and then recited "that He was ſeiſed of the Remainder and Reverſion in Fee, "of the ſaid Manor and other the Premiſſes in queſtion; and "that ſuch Remainder or Reverſion, after the Death of "his Wife, was alſo further expectant upon an Eſtate in "ſpecial Tail, ſettled upon his Son Sir *Robert* upon his Mar-"riage, by the above-mentioned Deed of 12th *June* 1669; "And that he had a Leaſe to the ſaid *Thomas Robert* and "*John Dacres*, for their Lives and the Life of the longer Liver "of them, according to the Power He had reſerved to him-"ſelf upon the ſaid Settlement:" After which Recital, he diſpoſed of his ſaid Remainder or Reverſion in Fee, to the Leſſor of the Plaintiff, in Tail Mail.

The Whole Deviſe was in the following Words—*viz.* "I "give and confirm unto my ſaid Wife Dame *Ann Atkyns*, "All thoſe Lands Tenements and Hereditaments in *Lower* "*Swell* aforeſaid, which were ſettled upon her for her Join-"ture, before our Mariage: And I hereby further give and "deviſe to Her, for Term of her Life, my Manor of *Lower* "*Swell*, and all the reſt of my Lands Tenements and Here-"ditaments whatſoever in *Lower Swell* aforeſaid, for Term "of her Life, as an Addition to her Jointure. And where-"as I am ſeiſed of the Remainder and Reverſion in Fee, of "the ſaid Manor of *Lower Swell*, and of the Reſt of the "ſaid Lands Tenements and Hereditaments in *Lower Swell*, "ſo ſettled, and by this my Will given and confirmed to "my ſaid Wife for her Life; which Remainder or Reverſi-"on, after the Death of my Wife, is alſo further expectant "upon an Eſtate in the ſaid Manor and Lands in Special Tail "ſettled upon my Son Sir *Robert Atkyns* upon his Marriage, "by Deed dated the 12th of *June* 1669, and upon his Sons "by this now Wife and no other Wife; and whereas I have "made a Leaſe, dated ‡ the 8th Day of *June*, in the "Year of our Lord 1698, executed by Livery and Seiſin, to "*Thomas Dacres*, Eſq; and to *Robert* and *John Dacres*, Gent-"lemen, for the Lives of the ſaid *Thomas Robert* and *John* "*Dacres* and the Life of the younger Liver of them, accord-"ing to a Power I reſerved to myſelf upon the ſaid Set-"tlement made upon the Marriage of my ſaid Son Sir "*Robert Atkyns*; Now I give and deviſe the *ſaid* REMAIN-"DER *or* REVERSION, and the BENEFIT OF THE TRUSTS "*of the ſaid Leaſe for Lives*, to my *Grandſon John Tracy*, "[the now younger and ſecond Son living of my Son-in-"Law *John Tracy* of *Stanway* in the ſaid County of *Glou-"ceſter*, Eſq; by my Daughter *Ann Tracy* his Wife,) and to "the Heirs Male of the Body of my ſaid Grandſon by him "to be begotten. And if my ſaid Grandſon happen to "die without Iſſue Mail, then I give and deviſe the "ſaid Remainder or Reverſion, to the next younger Son "of the ſaid *John Tracy* my Son-in-Law, called *Ferdinando* "*Tracy*, and to the Heirs Male of the Body of the ſaid *Fer-"dinando*. And for Default of ſuch Iſſue, then I give and de-"viſe

‡ The Teſtator miſtakes the Date of this Leaſe: It was 31ſt May. V. Ante, pa. 66.

" † viſe the ſaid Remainder or Reverſion to the next Youn- † Page 70.
" ger Son my ſaid Son-in-Law *John Tracy* may happen to
" have by my ſaid Daughter, and to the Heirs Male
" of the Body of ſuch next younger Son;" and ſo on, to other ſtill younger Sons, &c. (Theſe Deviſes were All upon Condition that the ſaid Sons reſpectively ſo inheriting the ſaid Manor and Lands, ſhould conſtantly uſe to call and write themſelves by the Name of *Atkyns* only, for their Surname, and by no other Surname.) And then the Will proceeds thus—" I do further give and deviſe all my
" Houſes and all Lands Tenements and Hereditaments ſi-
" tuate lying and being in or near *Curſitor's Alley* in
" *Holbourn* within the City of *London*, or the Suburbs
" thereof, or within the County of *Middleſex*, or in ei-
" ther of them;" in like Manner, and upon the like Condition, &c. And, reciting that the Reverſion or Remainder of his Manor and Lands in and of *Sapperton* aforeſaid, and of the Advowſon of the Church of *Sapperton*, and of and in his Manor of *Pinbury* and of the Lands thereto belonging, as alſo of *Pinbury-Park*, was in Him and his Heirs; and alſo of the 7 Hundreds of *Cirenceſter*, and of the Hundred of *Biſley*, all in the ſaid County of *Glouceſter*; He deviſed the ſame in like manner. The Words of his Will are theſe—" I having alſo made a Leaſe
" for Lives, of the ſaid Manors of *Sapperton* and *Pinbury*,
" and of the ſaid Advowſon of *Sapperton*, and of the ſaid
" *Pinbury-Park*, and of all the ſaid ſeveral Hundreds,
" the better to preſerve and ſupport the ſaid Remainders
" and Reverſions from being cut off or barred from any
" Recovery. And if my ſaid younger Grandſons happen
" to die without Iſſue Male, then I give and deviſe the ſame
" Reverſions and Remainders to my Nephew *Richard Atkyns*
" (Eldeſt Son of my late Brother, Sir *Edward Atkyns* de-
" ceaſed) and to his Heirs."

On the 9th *February* 1709, Sir *Robert Atkyns*, the Father, died, ſeiſed of the Premiſſes in Queſtion.

Upon his Death, Dame *Ann*, his Widow and Relict, entered thereupon; claiming the ſame for her Life, for her Jointure, under and by Virtue of the above mentioned Indenture of 26th *April* 1681: And was in *Poſſeſſion* thereof.

The Jury then find, an Indenture Tripartite dated the 18th of *May* 1710; made between *Richard Atkyns*, Eſq; Eldeſt Son and Executor of Sir *Edward Atkyns* (the Surviving Truſtee in whom the Terms for Years mentioned in the greater Deed were veſted,) on the 1ſt Part; *Joſeph Walker*, Gent. on the 2d Part; and the ſaid Sir *Robert Atkyns*, (the Son,) on the 3d Part: By which, after reciting the Indenture of Releaſe of 12th *June* 1669, and that it was therein mentioned, that Sir *Clement Farnham* and *Edward Atkyns* were poſ-

ſeſſed

† Page 71. † ſeſſed of ſeveral Terms for Years in the Premiſſes in queſtion, and that they were to ſtand poſſeſſed thereof in Truſt for ſuch Perſon and Perſons to whoſe Uſe and Uſes the ſame were limited by the ſaid Indenture; and reciting that the ſaid Sir *Robert Atkyns* (the Son) then claimed the ſaid Manor and Premiſſes BY AND UNDER *the* SAID *Indenture*; and that Sir *Clement Farnham* was dead, and the ſaid *Edward Atkyns* (afterwards Sir *Edward Atkyns*, Knt. Lord Ch. Baron of the Exchequer) ſurvived Him, and was alſo then dead, having firſt made his Will and the ſaid *Richard Atkyns* Executor thereof, and that He had proved the ſame; the ſaid *Richard Atkyns*, at the Inſtance and Requeſt of the ſaid Sir *Robert Atkyns* (the Son) teſtified by his executing the ſaid Indenture, and in Conſideration of 5s. paid to Him by the ſaid *Joſeph Walker*, aſſigned over the ſaid Manor and Premiſſes in Queſtion, to the ſaid *Joſeph Walker*, To hold to Him his Executors Adminiſtrators and Aſſigns, for all the then Reſidue and Remainder of the ſaid Terms whereof the ſaid Sir *Clement Farnham* and *Edward Atkyns* or either of them were poſſeſſed; In Truſt for the ſaid Sir *Robert Atkyns* (the Son) and the Heirs Male of his Body by the before-mentioned Dame *Lovis* his Wife; (the ſaid Premiſſes being ſo limited in and by the ſaid Indenture of Releaſe of 12th *June* 1669.) In which ſaid Indenture, there is a Covenant from Sir *Robert* (the Son) to indemnify the ſaid *Richard Atkyns* his Heirs Executors and Adminiſtrators againſt any Damages he or they might ſuſtain by reaſon of his making the ſaid Aſſignment to the ſaid *Joſeph Walker* as aforeſaid.

The Jury further find, That Dame *Ann Atkyns* being *ſo* in Poſſeſſion of the Premiſſes as aforeſaid; in *Trinity* Term 1710, 9 *Ann.* an Ejectment was brought in the Court of Common Pleas, for the Recovery of the ſaid Premiſſes, againſt Her the ſaid Dame *Ann* and the Tenants in Poſſeſſion of the ſame Premiſſes, by *John Philips*, upon the ſeveral Demiſes of the ſaid Sir *Robert Atkyns* the Son, and of the ſaid *Joſeph Walker:* In which Ejectment, the Demiſes were laid upon the 22d Day of *May* 9 *Ann.* To hold from the 20th Day of the ſame *May*, for 7 Years. And the ſaid Ejectment was tried at the Bar of the Court of Common Pleas, in *Michaelmas* Term following: And a general Verdict was found for the Plaintiff; and Judgment was entered up thereupon, againſt Her and the reſt of the Defendants therein, for the ſaid *John Philips*; and he recovered TERMINUM *ſuum predictum*, and had an *Habere facias Poſſeſſionem.*

The Jury further find, That upon this Trial, the ſaid two Indentures, called greater and leſſer Deeds, of 12th *June* 1669, were, BOTH *of them*, read and given in Evidence to the Jury: *But* that the Deed of *Aſſignment*, of 18th *May* 1710, was NOT produced, nor given in Evidence, to the Jury.

They

† They find, that ſoon after the ſaid Judgment in Ejectment, and during the Life of Dame *Ann*, Sir *Robert Atkyns* (the Son) entered into and was in Poſſeſſion of the Premiſſes in Queſtion, and in the ſaid Declaration in Ejectment mentioned. † Page 72.

They find, that on 1ſt *January* 1710, *John Philips*, the ſaid Plaintiff in Ejectment *ſurrendered* the two Terms mentioned in the ſaid Declaration in Ejectment to be demiſed to him by the ſaid Sir *Robert Atkyns* (the Son) and *Joſeph Walker*, to the ſaid *R. A.* (the Son) *then in Poſſeſſion* of the Premiſſes.

They further find, that on 17th *January* 1710, the ſaid Sir *R. A.* the Son, being *ſo in Poſſeſſion as aforeſaid*, and *during the Life-time of the ſaid Dame Ann Atkyns, Widow*, made a Feoffment to *James Earle*, of the Premiſſes in Queſtion, in Fee; by Indenture Tripartite of that Date, made between Himſelf on the 1ſt Part; *James Earle*, Yeoman, on the 2d Part; and *John Holmden*, Gent. on the 3d Part: which Feoffment in Fee is therein declared to be *for the docking, barring and deſtroying* ALL ESTATES TAIL, *Uſe and Uſes, Reverſions* and Remainders, at any Time thentofore made created or limited of and in the Manor and Premiſſes in Queſtion; and for the veſting and ſettling an Eſtate in *Fee Simple* therein, to and in the ſaid Sir *Robert* the Son. Sir *Robert* (the Son) did therefore, in Conſideration of 5s. thereby grant bargain ſell enfeoff and confirm unto the ſaid *James Earle* his Heirs and Aſſigns, the Premiſſes in Queſtion, To hold to, and to the Uſe of the ſaid *James Earle* his Heirs and Aſſigns for ever; To the *Intent* and *Purpoſe* that the ſaid *James Earle* might become perfect *Tenant of the Freehold* of the ſaid Premiſſes, in order for the ſuffering a *Common Recovery* in *Hilary* Term then next; wherein the ſaid *John Holmden* was to be Demandant, the ſaid *James Earle* Tenant, and Sir *Robert* Himſelf Vouchee. Which Recovery, it was thereby declared, was to be and enure to the Uſe and Behoof of the ſaid SIR ROBERT ATRYNS *(the Son) his Heirs and Aſſigns for ever*; and to or for no other Uſe Intent or Purpoſe whatſoever. And by this ſame Deed, Sir *Robert Atkyns* (the Son) conſtituted *Edward Carter* and *John Langford* his Attornies and Attorney, either jointly or ſeverally to enter upon and take Seiſin and Poſſeſſion of the Premiſſes, and to give and deliver Seiſin and Poſſeſſion of the ſaid *James Earle* and his Heirs and Aſſigns for ever, according to the Purport and true Meaning and for the Purpoſes in the ſaid Deed mentioned.

And the Jury find, that on 20th *January* 1710, *Edward Carter*, One of the ſaid Attornies, entered upon the Premiſſes, and gave Seiſin and Poſſeſſion thereof to the ſaid

James

‡ Page 73. *James Earle*, by Virtue of the ſaid Warrant of Attorney contained in the ſaid Indenture: As ‡ appears by a Memorandum indorſed upon the ſaid Indenture, and found by the Verdict.

They find that in *Hilary* Term the 9th *Ann*, 1710, a Recovery was ſuffered of the Premiſſes; wherein *John Holmden* was Demandant; *James Earle*, Tenant; and Sir *Robert Atkyns*, the Son, and *Lovis* his Wife, Vouchees; and Seiſin executed thereon: Which Recovery they find to be proſecuted had and executed to the ſeveral Uſes mentioned in the ſaid Deed of Feoffment. And they find, that after this Recovery, Sir *Robert* the Son *continued in Poſſeſſion* of the Premiſſes till the 9th of *November* 1711.

They find the Death of the ſaid Sir *R. A.* [the Son] on 9th *November* 1711, without Iſſue Male by the ſaid *Lovis* his Wife, who ſurvived Him.

They alſo find, that an Ejectment was brought for the Premiſſes, againſt *Robert Atkyns*, Eſq; and his Tenants of the Premiſſes in Queſtion, in *Hilary* Term 1711, 10 *Ann.* by *John Miles*, as Plaintiff, on the ſeveral Demiſes both laid to be made on 14th *February* 8 *Ann.* 1709. (which is 5 Days after Sir *R. A.* the Elder's Death) of Dame *Ann Atkyns* the Jointreſs, and of *Thomas Dacres*, the ſurviving Leſſee under the Indenture of Leaſe of 31 *May* 1698. And in *Eaſter* Term 1712, 11 *Ann.* a general Verdict was given for the Plaintiff, on both Demiſes, on a Trial at Bar in this Court: and Judgment was entered up accordingly, "that the Plaintiff do recover his ſeveral Terms aforeſaid." And the ſaid Dame *Ann Atkyns* entered upon the Premiſſes in Queſtion, immediately after this laſt Judgment; and continued in Poſſeſſion thereof till 9th *October* 1712: When ſhe died.

Soon after the Death of Dame *Ann*, the (original) Defendant *Robert Atkyns*, Eſq; Nephew and Heir Male to Sir *R. A.* the Son (and alſo Heir at Law to *R. A.* the Father) entered upon the Premiſſes, and continued in Poſſeſſion thereof till his Death; which happened on 16th *March* 1753. [*Robert's* Death was juſt 3 Months after the now Leſſor of the Plaintiff's actual Entry: And it was after Iſſue joined in this preſent Ejectment.]

John Dacres, one of the Leſſees in the Indenture of Leaſe dated 31 *May* 1698, died in 1705.

Robert Dacres, another of them, died in 1706.

Thomas Dacres, the third of them, *ſurvived* the other Two; and *died on* 23*d July* 1752.

They

‡ They find that *John Atkyns*, the *Leſſor of the Plaintiff*, ‡ Page 74: NEVER WAS IN POSSESSION of the Premiſſes in queſtion, or any Part thereof, nor in Receipt of the Rents and Profits thereof or of any Part thereof; NOR ENTERED thereupon, TILL *the* 15th of *December* 1752; *When* He *made an* ACTUAL ENTRY into and upon the ſame; claiming the ſame as *Deviſee* thereof under and by Virtue of the Will of the ſaid Sir *Robert Aktyns* the Father; and ejected, drove out, and removed the ſaid *Robert Atkyns*, Eſq; *Charles Coxe*, *Thomas Horde*, &c. therefrom; and was *ſeized thereof, as the Law requires*; and being ſo *ſeized* thereof, made the Demiſe to the ſaid *Cyprian Taylor* the now Plaintiff, on the 16th of *December* 1752, to hold from thence for 15 Years, By Virtue whereof the ſaid *Cyprian Taylor* entered on the 18th, and was ejected by the Defendants on the 19th.

And then they conclude generally, as uſual; ſubmitting the Matters of Law to the Judgment of the Court, upon the above Facts.

This Caſe was argued four ſeveral Times; Firſt, on *Tueſday* 3d *June* 1755, by Mr. *Yorke*, for the Plaintiff, and Mr. *Knowler* for the Defendants; Again, on *Tueſday* 11th *November* 1755, by Mr. *Pratt* for the Plaintiff, and Mr. *Perrott* for the Defendants; a 3d Time, on *Tueſday* 11th *May* 1756, by Mr. *Caldecot* for the Plaintiff, and Mr. Serjeant *Prime* for the Defendants; and a 4th Time, on *Friday* 19th *November* 1756, by Mr. *Caldecot* for the Plaintiff, and Mr. *Knowler* for the Defendants: But it is unneceſſary to repeat the three firſt Arguments particularly; Becauſe the laſt includes the general Subſtance of them.

The Sum of what was urged on the Part of the Plaintiff was, That the Leaſing and the Jointuring Powers *exiſted* at the Time when they were executed by Sir *Robert Atkyns* the Father; That thoſe Powers were *well executed* by Him; That the Leaſe and Jointure made by him, in Purſuance of thoſe Powers, were an *Impediment* to his Son Sir *Robert* the younger's Suffering a Common Recovery: That even ſuppoſing that *James Earle* was a good Tenant to the *Præcipe*, Yet the *Entry of Damè Ann* the Jointreſs, within the 5 Years, *avoided* this Recovery; and conſequently, that the Remainder or Reverſion in Fee, deviſed to the Leſſor of the Plaintiff by Sir *Robert* the Father, was *Not barred* by the Recovery thus ſuffered by Sir *Robert* the Son.

Theſe Points were entered into very largely, by Mr. *Caldecot* and the Gentlemen who had ſpoken before Him, on the ſame Side.

They, firſt endeavoured to prove that the Powers reſerved to Sir *R. A.* the Father by the Two Deeds of 12th *June*

‡ Page 75: *June* 1669 were *in* ‡ *being* and *valid* at the Time of the Execution of the Leaſe to the *Dacres*; and ſecondly, that they were *well executed*; and conſequently, that there were Eſtates of Freehold ſubſiſting at the Time when Sir *R. A.* the Son made the Feoffment to *Earle*; *viz.* Dame *Ann*'s Jointure, and the Leaſe to the *Dacres*: And therefore, thirdly, They inſiſted that theſe Life-Eſtates were Impediments to Sir *R. A.* the Son's Suffering the Common Recovery. They denied that Sir *Robert Atkyns* the Son was Tenant in Tail in *Poſſeſſion*, at the Time that he made the Feoffment to *James Earle*: So that *Earle* could not be a good Tenant to the *Præcipe*. And they urged that even admitting that Sir *R. A.* the Son was Tenant in Tail in Poſſeſſion, Yet He could not upon this *naked* Poſſeſſion, without the Freehold, make a good Tenant in the *Præcipe* without the *Jointreſs* and the *Leſſee for Life*'s *joining*: And that the Court *cannot*, (under 14 *G.* 2. *c.* 20. *ſ.* 1.) PRESUME *a previous Surrender or Conveyance* of the Eſtates for Life, in order to make the Recovery good.

They further, fourthly, inſiſted, that ſuppoſing Sir *Robert Atkyns*, the Son, was Tenant in Tail in Poſſeſſion, and alſo that there was a good Tenant to the *Præcipe*; (ſo that the Recovery was good, as a Common Conveyance;) Yet the *Re-Entry* of Dame *Ann Atkyns*, the Jointreſs, within the 5 Years (in 1712) actually *avoided* this Recovery; which, if not void, was at leaſt *voidable* by the Tenant for Life: And this Re-Entry of the Tenant for Life *re-veſted* all the ſubſequent Eſtates.

The *great* Streſs of the Queſtion lies (as they ſaid) upon the *Tenant to the Præcipe*.

1ſt Point, The 1ſt Point, in Order of *Time*, is the *Validity of the two Powers* created by the greater Deed of 1669.

But there is no Ground, either for the Suppoſition of *a Fact*, "That the leſſer Deed muſt have been executed *laſt*;" or for any *Inference* in Point of Law, "That it operates to "the *Extinction* of theſe Powers."

The *Fact* concerning the Priority of Execution of the two Deeds cannot, *now*, be determined by any Evidence: Therefore *Preſumption* muſt determine it.

Now one of theſe Deeds is an Agreement to execute the other: Conſequently, muſt have been prior to it. The leſſer Deed *covenants*; The greater *performs* that Covenant: Therefore the leſſer was prior. If it had been executed *laſt*; *that* would have deſtroyed the very Effect

‡ Effect of it and the Powers raiſed by it. Dame *Mary* was giving up and exchanging her former Jointure: And therefore *She* might deſire a ſingle diſtinct Deed, to ſecure her own Intereſt. For which Purpoſe, a Deed of Covenant was the moſt proper: And there was no Need to incumber this Leſſer Deed, with the Powers inſerted in the Greater Deed; which Powers did not concern *Her*. Whereas, in order, to ſupport a contrary Argument, it is neceſſary to ſuppoſe a *new* Agreement (without, and even againſt, any Reaſon for it,) to alter and deſtroy the former Agreement. But if the Parties had *meant* ſo, they would have ſo *expreſſed it*. ‡ Page 76.

However, ſuppoſing the leſſer Deed to have been *actually* executed *laſt*; Yet being all *Uno Flatu*, the *Law* will order the Time, ſo that the proper Deed ſhall be *taken* to be anterior, and the other ſubſequent, *according to* the *Reaſon of the Thing* and the *Intent of the Parties*. *Digges*'s Caſe, 1 *Co. Rep.* 173. *Albany*'s Caſe, 1 *Co. Rep.* 107. and 2 *Rep.* 75. the Lord *Cromwell*'s Caſe.

And the operation of the *Fine* will *follow* the *Conſtruction of the Deed*.

Counteſs of *Rutland*'s Caſe, 5 *Co.* 26. *a.*

Therefore, the Exiſtence of the Powers being eſtabliſhed, The next Queſtion is, "Whether they have been WELL "*executed*." Dame *Mary*'s *Jointure* has *not* been objected to: But the Leaſe made to the *Dacres* has; (1ſt) As being *without a ſubſiſting Power* in Sir *R. A.* the Elder, the Leſſor, to make it; (2dly) As being FRAUDULENT, even ſuppoſing Him to have had Power to make it; (3dly) As the Livery and Seiſin was made to the Attorney of ONE *only* of the three Leſſees, and not to *All* 3, or their Joint-Attorney. Second Point.

Now it is true, that a Tenant in Tail *in Poſſeſſion* may ſuffer a Recovery: So alſo may a Tenant in Tail in *Remainder*, if he can *get in* the *Tenant for Life*.

But the Original Donor may interpoſe as many Eſtates for Life, as he pleaſes, before and prior to the Tenancy in Tail. And this Leaſe to the *Dacres*, under the Power, is juſt *the ſame* as if it had been ORIGINALLY *interpoſed*. And the *Declaration of the Intention* will NOT *vitiate the Eſtate* limited to theſe *Dacres*: If it had been even a *Condition* annexed, in Reſtraint of Alienation, ſuch a Condition would have only been void; and the *Eſtate*, good. *Co. Litt.* 24. *a. Corbet*'s Caſe, 1 *Co.* 84. *Mary Portington*'s Caſe, 10 *Co.* 35. *b.*

As

‡ Page 77. ‡ As to Fraud--There is Nothing fraudulent in this Leaſe. And both the Terms have been actually recovered at Law.

If Sir *R. A.* the Father's ſuperfluous Declaration has any Effect, it makes the Leaſe Good: And it would have been adjudged good, if it had been called in queſtion whilſt it ſubſiſted. 2 *Leon.* 132. *Moore* and *Savill*'s Caſe.

And No *One* is hurt or defrauded by this Leaſe. *Not the Jointreſs:* For, the full and beſt Rent is reſerved. Therefore *Cro. Eliz.* 5. *The Counteſs of Suſſex*'s *Caſe* does not affect *this* Caſe: For there, the Jointreſs ſuffered. Nor is the *Tenant in Tail* hurt; for the ſame Reaſon, as to his *Rent:* And as to the *poſtponing* his Power to ſuffer a Recovery, it was legal, and might have been done by a real actual Demiſe for Life or Lives. And the Eyes of this Court do not pierce further than the *Shell* of the Conveyance; Not to the *Deſign* of it. As in Caſes of Terms to preſerve contingent Remainders, This Court cannot hinder the Truſtee from deſtroying them: So, of Terms to attend inheritances; Which this Court cannot hinder the Mortgagee from getting in. *Cro. Car.* 190. *The Caſe of Naſh* v. *Preſton*, is a ſtrong Caſe to ſhew that the Court of *Law* will not meddle with the *Equity* of the Caſe.

Now this Leaſe has *purſued the Power:* And this Court will not meddle with the *Intent.*

Leaſes made by Churchmen, for the Benefit of their Families, are generally as fictitious as this: And yet they are always allowed to be good.

As to the Livery and Seiſin—This Livery to *Thomas Barker* enured to the Uſe of all the *three Dacres*, according to the Purport and true Meaning of the Letter of Attorney, moſt explicitly therein expreſſed, and ſo declared at the Time of the Livery, by Sir *R. A.* the Elder who gave it.

This ſufficiently appears (as the preſent Infeoffment was *by* DEED,) from *Bro. Abr.* Title *Feffements de terres, pl.* 16. 67, 72. and *Co. Litt.* 48. *b.* 49. *a.* But 2 *Anderſ.* 196. *pl.* 14. *The Caſe of Davy* v. *Abbot*, is in Point: 'Tis moſt exactly the ſame Caſe as this.

So that the *Life*-Eſtates of Dame *Ann* and of the 3 *Dacres* appear to have been *well created.*

Conſequently therefore, a *double* Freehold is ſufficiently eſtabliſhed; *viz.* One, in Dame *Ann*; the Other, in the *Dacres.*

From

† From hence it follows, Thirdly, That Sir *Robert Atkyns* the Son, was by them precluded from ſuffering this Recovery: As he was not Tenant in Tail *in Poſſeſſion*, at the Time of his making the Feoffment to *James Earle*, Therefore He was to gain a Freehold as he could; by Right or Wrong: And it may be ſaid, that *Either* of them will do. † P. 78. 3d Point.

But even ſuppoſing Him to have been Tenant in Tail in *Poſſeſſion*, Yet *James Earle* was *no good Tenant to the Præcipe*.

When he recovered againſt Dame *Ann*, He was *not* Tenant in Tail in Poſſeſſion: But he recovered againſt Her, upon a Suppoſition "that he *was*." Which Suppoſition was grounded therefore upon a Miſtake. And the Terms which *Philips* recovered as his Leſſee, and ſurrendered to Him, were Both of them *fictitious*. So that the Feoffment to *Earle* muſt fall to the Ground, having no Foundation to ſupport it. And though Livery was given to Him by Sir *Robert*, yet Sir *Robert* Himſelf CONTINUED in Poſſeſſion *till his Death*.

Which Obſervations being premiſed, this Part of the Caſe may be conſidered, 1ſt on Sir *Robert*'s Verdict and Judgment againſt Dame *Ann*; and 2dly on his ſubſequent Feoffment to *Earle*.

Firſt—His Entry under the Judgment cannot amount to a *Diſſeiſin*; Nor had He thereby, an Eſtate, *purſuant to his Title*, as there claimed by Him; It could *not be more* than an Eſtate in Tail, EXPECTANT *upon two Freeholds*. It could not be a Diſſeiſin: Becauſe it was an Entry UNDER a *Verdict*. In Truth, He gained only a bare *naked Poſſeſſion*, *without* the Freehold. And ſo is the Writ of *Habere facias Poſſeſſionem*: And the Judgment is "to recover the *Term*" *only*. And *Cro. Eliz.* 438. *the Caſe of Bateman* v. *Allen*, (upon a Deviſe the ſame with that in the Caſe of *Newys and Scholaſtica his Wife*, v. *Larke*, in *Plowd.* 403.) alſo proves this.

Therefore the Entry under the Judgment in *Ejectment* could give no Title to Sir *R. A.* the Son, to ſuffer a Recovery: It was a LAWFUL ENTRY; but an UNLAWFUL HOLDING. *Co. Lit.* 57. *b.* A wrongful Withholding is not a Diſſeiſin; but a Deforcement. *Co. Litt.* 277. *b.* 331. *b.* 354. *b.* 355, 356. And this is without the Freehold.

'Tis like the Caſes of Tenant at Sufferance: 12 *Aſſiſe* 22. *Co. Lit.* 57. *b.* 1 *Ro. Abr.* 659. Title *Diſſeiſin*, Letter C *pl.* 10, 11. *Cro. Jac.* 169. *The Caſe of Butler* v. *Duckmanton*. *Co. Lit.* 270, 271. *Cro. Eliz.* 238. *The Caſe of Allen* v. *Hill*. All which Caſes concur to prove "That "Nothing

B. 79. "‖ Nothing ſhall operate by way of Diſſeiſin, but a TORTIOUS ENTRY."

And there is NO MIDDLE *kind of Holding*, between a *naked Poſſeſſion*, that diſturbs nothing; and a *Fee*, which diſturbs every Thing.

Then, ſecondly, as to the Feoffment to *James Earle*. It gained no Eſtate to *Earle*. This is a very great Point to Families, for the Preſervation of Intails.

If the contrary Conſtruction ſhould prevail, even Tenants *at Will* might do the ſame thing.

But the Line is drawn thus, *viz.* "That a Tenant in Tail, "WITH *the Freehold*, may bar: But *without* it, He can "NOT."

A *Real* Feoffment indeed *may* do it: But a *fictitious* One can not; but ſhall be conſidered as fraudulent and void, like that in *Saville* 126. *Leon. White* v. *William Bacon*. It is not a Diſcontinuance: *Swift* v. *Heath*, *Carthew* 109, 110.

Sir *R. A.* the Son, gained no Fee by it, to himſelf; nor any to *Earle*: And the Court will conſider it as merely *colluſive*.

That He gained None, *to himſelf*, appears from 1 *Brownlow* 230. *Dame Pett's Caſe*. 2 *Inſt*. 412, 413. *Cro. Car*. 302. *Blunden* v. *Baugh*. *Bracton Lib*. 4. *pa*. 161, 162. *Co. Lit*. 153. *Dy*. 62. 11 *Aſſize* 6. *Powſley* v. *Blackman*, *Cro. Jac*. 659. *Bull* v. *Wyat*, *Cro. Car*. 388.

That He gained None *to Earle*, is equally true. *Earle* gained no Eſtate of Freehold, by this Feoffment; either as a Wrong-Doer, or as a Diſſeiſor. 1 *Ventr*. 360. Serjeant *Maynard*'s Argument in *Moore* v. *Pitt*.

He might indeed be taken as a Diſſeiſor, *at* the Election of the right Owner; but *not* againſt it. And here was *no Intention* of a Diſſeiſin. *Cro. Jac*. 643. *Ferrers* v. *Farmer*. 1 *Mod*. 107. *Fountain* v. *Coke*. In Fact, here was NO *Actual Diſſeiſin*: For Sir *R. A.* the Son *continued* in Poſſeſſion. Neither was here any Force or Expulſion. And it is not *every* Entry, that is a Diſſeiſin: 'Tis no Diſſeiſin, unleſs there be an Expulſion. *Co. Lit*. 181. 1 *Salk*. 246. *pl*. 2. moſt expreſsly.

Conſidering this Feoffment AS *part* of the CONVEYANCE *of a Common Recovery*, as a *Common Aſſurance*, Sir *Robert* the Younger had no Power to make a Feoffment.

It

• It is not hereby meant that he could not *in Fact* make a † Page 80.
Feoffment: *Every* Man in *Poſſeſſion may* do it. But this Sir *R. A.* the Son, could not convey an Eſtate of Freehold, by any *rightful* Conveyance, as Fine, Releaſe, or Bargain and Sale. And if He cannot do it by a *rightful* Method, will the Law permit him to do it by a *wrongful* One? Surely not. The Poſſeſſion of a Tenant *at Sufferance* is not ſufficient to build a Title upon. *Co. Litt.* 278. *Cro. Jac.* 169. *Cro. Eliz.* 238.

Common Recoveries are now conſidered as a *mere Conveyance:* And the Recoveror is a *mere Inſtrument and Creature* of the Tenant in Tail. 2 *Rep.* 77. *Cromwell's Caſe. Poph.* 23. *The Caſe of Crocker and York* v. *Dormer. Cro. Jac.* 643. *Sir John Ferrers and Sir John Curſon* v. *Sir Richard Fermor and others.* 2. *Ro. Rep.* 247. S. C. (at the End of it.) 1 *Mod.* 107. *Fountain* v. *Coke.* So, the known Caſe of Copyholds, 4 *Co.* 28. *a. Coke's Compleat Copyholder*; And the Caſe in *Ro. Rep.* 223. *Herbert* v. *Binion.*

From all which Caſes it is clearly to be inferred, That the whole Tranſaction is *One Common Aſſurance*; that the Recoveror is a *Creature* and *Inſtrument* of the Tenant in Tail; and that it ſhall not be conſidered as a *tortious* Entry and a *Diſſeiſin, in* a *Common* Aſſurance.

Such a Feoffment as this may be made by *any* Perſon in Poſſeſſion: And, if this ſhould be eſtabliſhed, it may be of very miſchievous Conſequence; and will introduce a *new* Law, contrary to all *former* Rules and Doctrines.

The *Stat.* 14 G. 2. *c.* 20. conſiders a Common Recovery as a *Common Aſſurance*; and has a Proviſo, "That the Perſon "*had a Title to make a Tenant to the Præcipe.*" And here is not the leaſt Ground to preſume that the Tenants for Life either joined or ſurrendered their Eſtates.

Now if the Law conſiders that ſome Perſons *have* this Power, and others *have not*; the Law will never ſuffer that to be done by *Fraud*, which can *not* be done *fairly and regularly.* And this whole Tranſaction is *fraudulent* and *colluſive*, and done *eo animo* to bar the ſubſequent Eſtates; and is therefore VOID, *as a* FRAUD, within the Rule and Reaſon of *Fermor's* Caſe. 3 *Co.* 77. *b.* which conſiders an Eſtate made by Colluſion and Fraud, as *no* Eſtate.

Laſtly,—Admitting the Facts of Sir *R. A.* the Son's be- 4th Point.
ing Tenant in Tail in Poſſeſſion; and alſo, that there was a good Tenant to the *Præcipe*; Yet THE RE-ENTRY *of the Jointreſs* actually *avoided* it, and *reveſted* all the ſubſequent Eſtates.

‡ P. 81. ‡ If the Recovery was not abſolutely void, but good AS *a* COMMON *Conveyance*, yet it was VOIDABLE: And if it was voidable, then it was *actually* AVOIDED by the Entry of Dame *Ann*, upon Demiſes laid as far back as the 14th of *February* 1709.

To prove this, they applied the Caſes in 11 *Co.* 51. *b. Lifford*'s Caſe; *Cro. Eliz.* 540. *Holcomb* v. *Rawlyns*; 1 *Anderſon* 352. *Butler* v. *Baker*; *Fitz-Gibbon* 225. *Bunker* v. *Cooke*; *Holt*'s *Caſes* 748; 1 *Co.* 14. *b.* Sir *William Pelham*'s Caſe; and a Caſe in *C. B.* in *H.* 12 *Ann. Goodtitle* v. *Riſden.*

It is like the *Regreſs of a Diſſeiſee*; Which avoids all intermediate Acts, by *Relation.*

Argument ex parte Def. Mr. *Knowler*, who twice argued this Caſe for the Defendants, included in his laſt Argument all that had been or could be urged on that Side of the Queſtion: And it was to the following Effect.

The *main Queſtion* upon this Caſe is, " Whether the Re-
" covery ſuffered by Sir *R. A.* the Son, be a GOOD *Reco-*
" *very.*"

For 'tis inſiſted by the Leſſor of the Plaintiff," " That the
" Recovery is *void*, as being ſuffered by a Perſon who had
" *only* a BARE Poſſeſſion, and had *no Power* to make a Tenant
" to the *Præcipe.*"

But *if* the Recovery is *good*, the Leſſor of the Plaintiff can have no Title: Becauſe *he* claims under a Limitation in Fee, expectant on the Determination of an Eſtate Tail, which is *barred* by the Recovery.

The *Limitations*, under which *All* the Parties derive their Title, are contained in two Deeds, dated 12th *June* 1669: Which, from their Bulk, and for Diſtinction's Sake, have been called the *great* Deed and the *little* Deed.

The *great* Deed is a Releaſe, grounded on a Bargain and Sale for a Year: The *little* Deed is a Covenant to levy a Fine, and a Declaration of the Uſes of the Fine.

In ſpeaking to the Queſtion,

Four Matters muſt be taken into Conſideration, *viz.*

Firſt, The *Order* in which the two Deeds were executed; and in what manner they *influence* each other. And from this

† this Conſideration it will appear, Whether the Leaſing and Jointuring *Powers* did EXIST at the Time when they were exerciſed by Sir *Robert Atkyns* the Father. † P. 82.

Secondly, Suppoſing the Leaſing and Jointuring *Powers* did then exiſt, Then whether thoſe Powers were WELL EXECUTED by the ſaid Sir *Robert* the Father.

Thirdly, Suppoſing they were well executed, Then Whether the *Leaſe* or the *Jointure*, made purſuant to theſe Powers, were AN IMPEDIMENT *to Sir Robert Atkyns the* SON'S *ſuffering the* RECOVERY.

Fourthly, If the Recovery was good, Then Whether the RE-ENTRY *of Dame Ann*, under the ſecond Ejectment, *did* AVOID *it*.

Firſt, As to the *Order* in which the two Deeds were executed; and in what Manner they *influence* each other. 1ſt, Point.

It is found by the Verdict, That Sir *R. A.* the Father, being ſeiſed of the Eſtate in queſtion and of ſeveral other Eſtates, on 12 *June* 1669, made and executed 3 Indentures. By the firſt, He, in Conſideration of a Marriage before that time had with Dame *Mary* his then Wife, and of her releaſing a former Jointure made to her before their Marriage, covenanted that He and the ſaid Dame *Mary* his Wife and Sir *Edward Atkyns* (his Father) would levy a Fine to *Edward Carteret* and *John Lowe*, of the Eſtate in queſtion *only*; to the Uſe of Sir *R. A.* the Father for Life, *ſans* Waſte; Remainder to the ſaid Dame *Mary*, for Life, for her Jointure; Remainder to Sir *R. A.* the Son and the Heirs Male of his Body by *Lovis Carteret* his intended Wife; Remainder to the Right Heirs of Sir *Robert* the Father.

By the 2d Indenture (taken in the Order as they ſtand in the Verdict) The Eſtate in queſtion is bargained and ſold by Sir *Edward A.* and Sir *R. A.* the Father, to Sir *Edward Carteret* and *John Lowe*, for a Year.

By the 3d Indenture Sir *Edward A.* and Sir *Robert A.* the Father, in Conſideration of a Marriage before that Time had between Sir *R. A.* the Father and Dame *Mary* his then Wife, and of a Marriage to be had between Sir *R. A.* the Son and *Lovis Carteret*, and of her Marriage Portion, and for a Proviſion to be made for Dame *Mary*, of a Jointure, releaſe the Eſtate in queſtion *(inter alia)* to *Carteret* and *Lowe* and their Heirs, To the Uſe of Sir *R. A.* the Father for Life, *ſans* Waſte; Remainder (except Timber) to Dame *Mary* for Life, for her Jointure; Remainder to Sir *R. A.* the Son and the Heirs Male of his Body

† P. 83. † Body on the Body of *Lovis Carteret*; Remainder to the right Heirs of Sir *R. A.* the Father. (Theſe are all the Limitations in this Indenture, concerning the Eſtate in queſtion.) Sir *R. A.* the Father covenanted with Sir *George Carteret* (the Father of *Lovis C.*) That for the better ſecuring the Eſtate in queſtion to Sir *Edward C.* and *John Lowe* and their Heirs, He and Dame *Mary* his Wife and Sir *Edward Atkyns* would levy a Fine to *Carteret* and *Lowe* and their Heirs, to the Uſes before declared.

In *Trinity* Term 1669, a Fine with Proclamations was levied, of the Eſtate in queſtion (together with other Eſtates) by Sir *Edward A.* Sir *R. A.* the Father, and Dame *Mary* his then Wife, to Sir *Edward Carteret* and *John Lowe.*

It is NOT found, *which* of the two Deeds was executed *firſt*; (though it was a Matter of *Fact*:) So that the Priority of Execution muſt be determined by the Court, from *Circumſtances* and *Preſumptions.*

The Order in which the Two Deeds ſtand *in the Verdict*, concludes Nothing, One way or the other: Since they are placed there, *as* they were given in Evidence.

Then He proceeded to compare the two Deeds, and to reaſon upon them; and argued very elaborately, That *either* the *little* Deed was executed AFTER *the great Deed*; Or that the little Deed was made with a *View to control or correct the great* Deed; Or that the *great* Deed, and the *little* Deed, and the *Fine* muſt be conſidered as *One* ASSURANCE, (though *not* as incorporated, and as one ſingle *Act*:) And in either Caſe, there is an *End* of the *Leaſing* Power, and alſo of the *Jointuring* Power.

And He argued very ſtrenuouſly, That the *Fine* would *extinguiſh* both thoſe Powers; becauſe they were Powers *appendant* and *annexed* to Sir *R. A.* the Father's Eſtate for Life, and NOT *collateral* to his Eſtate.

2d Point. Second Point or Head—Suppoſing the *great* Deed was *laſt* executed, Or that it *controls* or *corrects* the little Deed, Then

Whether the Leaſing and Jointuring *Powers* were *well* EXECUTED by Sir *R. A.* the Father.

He choſe to ſay nothing as to the Execution of the *Jointuring* Power; no Circumſtances attending the Execution of *it*, having been laid before the Jury: But confined Himſelf to the *other*, (the † *Leaſing Power.*)

† See the Note at the End of the Reply, pa. 104, 105, accounting for curtailing this Part of the Argument.

Now

* Now this Leaſe is *void*, as againſt Law; being made for no other purpoſe than to *reſtrain Sir R. A. the Son from ſuffering a Recovery*. For that *Reſtraint is againſt Law*. * Page 84.

The Power to *ſuffer a Common Recovery*, is a Privilege *inſeparably incident* to an Eſtate Tail: It is a *Poteſtas alienandi*, which is *not reſtrained* by the Statute *de Donis*; and has been ſo conſidered ever ſince *Taltaram's* Caſe. [12 *E.* 4. 14. *b. pl.* 16.] And this Power "to ſuffer a Common Recovery," *cannot be reſtrained* by *Condition*, *Limitation*, *Cuſtom*, *Recognizance*, *Statute*, or *Covenant*.

That it cannot be reſtrained by *Condition*, appears by *Co. Litt.* 223. *b.* 224. *a.* and *Sonday's* Caſe, 9 *Rep.* 128.

That it cannot be reſtrained by *Limitation*, appears by *Cro. Jac.* 696. *Foy* v. *Hinde*; and by *Sonday's* Caſe, and other Books.

That it cannot be reſtrained by *Cuſtom*, appears by the Caſe of *Taylor* and *Shaw*, in *Carter* 6 & 22.

That it cannot be reſtrained by *Recognizance*, or by *Statute*, appears by *Pool's* Caſe cited in *Moore* 810.

That it cannot be reſtrained by *Covenant*, appears by the Caſe of *Collins* v. *Plummer*, 1 *Peere Wms.* 104.

That an ATTEMPT *to ſuffer a Common Recovery* cannot be reſtrained, appears by *Corbet's* Caſe, in the 1 *Rep.* 83. *Mildmay's* Caſe, in the 6 *Rep.* 40. and the Caſe of *Pierce* v. *Win*, in 1 *Ventr.* 321.

And that a CONCLUSION *to ſuffer a Recovery* cannot be reſtrained, appears by *Mary Portington's* Caſe, in the 10 *Rep.* 35.

So that the Queſtion is reduced to this, "Whether *that* "can be effected by a LEASE *made purſuant to a Power*, which "can *not* be attained by a Condition, Limitation, Cuſtom, "Statute, Recognizance, or Covenant."

Since the Law has been thus careful to preſerve this incidental Privilege of ſuffering a Common Recovery, to a Tenant in Tail, Surely it will not permit this *new* Experiment, *equally deſtructive* to that Privilege to take Place. This is the *firſt Attempt* of the Kind: And it is a ſound Rule of Law, "That what *never has been*, ought *not to be* permitted."

The

‡ Page 85. ‡ The LEASE is alſo *void*, as being *fraudulent:* For it was made, to deprive Sir *R. A.* the Son, of the Profits of the Eſtate, and of an incidental Power over it. And the Fraud which made it void, was *apparent*. And as the Eſtates affected by the Leaſe, ſubſiſted before the Leaſe was made, the Leaſe *was fraudulent at Common Law.*

To prove the Leaſe to be fraudulent, He relied on *Savile* 126. *The Caſe of White* v. *Bacon*, *H* 32 *Eliz.* In a *Formedon*, the Tenant pleaded Non-tenure: On which, the Parties were at Iſſue. The Jury found "That the Tenant made a Feoff-"ment to ſeveral Perſons, to their own proper Uſe, before "the Writ purchaſed; and that the Feoffees *never took the* "*Profits* of the Land; but that the Feoffor took them, until the "Day of purchaſing the Writ." And the Doubt was, Whether the Feoffment was fraudulent as againſt the Demandant. And the Judgment of the Court was: "That it *was* fraudu-"lent and void." Now if the Feoffee's *not* taking the Profits, but the FEOFFOR'S *taking them* was a Reaſon for adjudging the Feoffment to be fraudulent againſt the Demandant in *that* Caſe; The Leſſee's *not taking the Profits, not paying the reſerved Rent, nor having the Leaſe in his Cuſtody*; but the LESSOR'S CONTINUING *in Poſſeſſion* and taking the *Profits to the Day of his Death*, ſeem in the *preſent* Caſe, to be full *as cogent* Reaſons for determining this Leaſe to the *Dacres* to be fraudulent, againſt Dame *Ann* and Sir *R. A.* the Son.

If this Caſe ſhould be anſwered by ſaying "The Feoffment "therein mentioned was made void by 13 *Eliz. c.* 5. made "againſt fraudulent Grants;" The Reply would be "That "that Statute was made in Affirmance of the Common Law;" as appears by *Twine*'s Caſe in the 3 *Rep.* 82. *b.* But He argued that the Leaſe was fraudulent not only at *Common Law, but likewiſe* by the Statute. For the Marriage of Dame *Mary* with Sir *R. A.* the Father, and Dame *Mary*'s Releaſing her former Jointure, were a *valuable Conſideration* for the Eſtate limited to Dame *Mary* for Life: And the Marriage-Portion of *Lovis Carteret* was a *valuable Conſideration*, which extended to the Limitation to Sir *R. A.* the Son and the Heirs Male of his Body by *Lovis Carteret.*

Here it hath been obſerved, "That if the Leaſe had been called in queſtion *whilſt it ſubſiſted*, it could *not* have been avoided: but *would have been adjudged abſolute*, for the Benefit of the Leſſees:" And 2 *Leon.* 132. *Moore* and *Savill*, and other Books, were cited as Authorities to ſupport the Obſervation.

Anſwer——The Objection to the Leaſe is, "That it "NEVER DID *ſubſiſt*," for the Reaſons which have been mentioned:

‖ mentioned: And if the Leaſe was *void* from the Beginning, ‖ Page 86.
'tis a *Contradiction* to ſay "it ſhall be adjudged abſolute." And the Authorities cited are, All of Conditions ſubſequent to the Eſtate created at the ſame Time with the Condition. In which Caſes, there was no Objection to the Eſtate; (for the Eſtate was allowed to be well created:) But the Objections were to the Conditions, which were *ſubſequent* to the Eſtate.

It has been obſerved further, "That the Eyes of the Court "do not pierce further than the Shell of a Conveyance; *not* "to the *Deſign* of the Maker of it." Here indeed one muſt be at a Loſs for an Anſwer; for want of knowing what the *Shell* of a Conveyance is. But there is one Thing that appears upon this ſpecial Verdict, which very much favours, if it does not directly eſtabliſh what We have been contending for: And that is the *Verdict* which is found to have been *obtained* BY *Sir R. A. the Son, againſt Dame Ann* the Second Wife of Sir *R. A.* the Father; which Verdict is a *Diſaffirmance* of the *Leaſing* and *Jointuring* Powers; and *could not have been obtained*, if thoſe Powers *had ſubſiſted*. 'Tis true, there is a Deed found alſo in the ſpecial Verdict, which was made between the Death of Sir *R. A.* the Father, and the bringing the Ejectment, and to which Sir *R. A.* the Son is a Party; In ‡ which Deed there is a *Recital* "That Sir *R. A.* "the Son then claimed the Eſtate in queſtion, BY *and* UNDER "*the* GREAT *Deed*:" Which Deed was not given in Evidence on the Trial of the Ejectment. But this finding is a Matter of no Moment: For the little Deed was executed either before or at the Time, or elſe ſubſequent to the Time of executing the great Deed. If it was executed *ſubſequent* to the Execution of the great Deed, then the little Deed and Fine control the great Deed, by *extinguiſhing* the Powers. If it was executed *before*, or *at* the Time of executing the great Deed, then the two Deeds and the Fine may be taken *as One Aſſurance*: (*V. Ante* 83.) And in that Caſe the little Deed *corrects* the great One, by limiting the Eſtate in queſtion, to Sir *R. A.* the Father, *diſcharged* of the Powers. And in *either* Caſe it may be ſaid, with great Truth, "That Sir "*R. A.* the Son *claimed under the* GREAT *Deed*." However, ſuppoſing the Perſon who drew the Deed, had miſtaken the Law, and made a *falſe* Recital, ſurely a *Miſ-Recital* of Matter of *Law* will *not conclude a Court of Juſtice*. And what Sir *R. A.* the Son's *own* Opinion upon the Matter was, will appear by the recent Purſuit of his Title againſt Dame *Ann*; for Sir *R. A.* the Father died in February 1709: And in *Trinity* Term following Sir *R. A.* the *Son*, brought his Ejectment againſt Dame *Ann*, who was then in Poſſeſſion of the Eſtate under the Jointuring Power.

‡ The Indenture Tripartite dated 18th May 1710. V. pa. 70.

But

‡ Page 87. But it having been found, "That afterwards Dame *Ann* "brought an Ejectment and recovered the Eſtate, ‡ upon two "Demiſes, one made by Herſelf and the other by the ſur-"viving Leſſee for Life;" It hath been inſiſted that Dame *Ann* COULD NOT *have obtained that Verdict*, UNLESS the *Two Powers*, or *One* of them at leaſt, *had then exiſted*.

To which it may be anſwered, That it does not appear that the *little* Deed was PRODUCED *in Evidance*, upon the Trial of that Ejectment. Or perhaps the *Jointuring* Power *only* might then be in Queſtion: Or there might have been *other Reaſons* for the Difference in Opinion. But however it might happen, ſtill that Verdict is *not concluſive*.

Here, Mr. *Knowler* argued that the Leaſe to the *Dacres* muſt have determined in 1711, upon the Death of Sir *R. A.* the Son, without Iſſue Male: And that the Leſſor of the Plaintiff was *barred of his Remedy* by *this* Action of Ejectment, (being an Action grounded on an Entry;) becauſe it was not brought within 20 Years after his Title accrued; and conſequently, his *Entry was not lawful*, by 21 *Jac.* 1. *c.* 16.

But theſe Parts of his Argument are omitted, for the Reaſon given in the Note, *pa.* 104, 105.

3d Point. Third Point or Head——But ſuppoſing the Leaſing and the Jointuring Powers *did exiſt*, and *were well executed by* Sir *R. A.* the Father; The Matter which falls next under Conſideration is, "Whether the Leaſe or Jointure made in Exe-"cution of the Powers, were an IMPEDIMENT to Sir *R. A.* "the Son's *ſuffering the Recovery*."

The Point we ſhall endeavour to eſtabliſh, is, That *James Earle*, the Perſon againſt whom the Writ of Entry was brought, *was Tenant of the Freehold* when Judgment was given againſt him in the Common Recovery. And we ſhall begin with obſerving that the *Jointure* or the *Leaſe* could be *no* Impediment to Sir *R. A.* the Son's ſuffering the Recovery; *Becauſe* neither of the Leſſees or Dame *Ann* were *in Poſſeſſion* of the Eſtates, at the *Time* when Sir *R. A.* the Son made the Feoffment to the ſaid *James Earle*.

‡ Note—Upon his firſt Argument, He had urged upon the Authority of *Bro. Abr.* Title *Feffements de terres, pl.* 67.) "That no Freehold paſſed by the "Livery, to any of the 3 Leſſees, *except John* Dacres who executed the Letter of "Attorney to take it: Which *John* dying in 1705, the Leaſe expired *then*." But He did not *now* inſiſt upon this Point, but ſeemed, rather, to give it up.

‡ *If* the Court ſhould be of Opinion, on the Authority of 2 *Anderſon*, 196. "That the Livery under the Letter of "Attorney of *John Dacres*, veſted the Freehold in his Co-"*Leſſees* as well as in Himſelf; and *not* in himſelf *only*;" Then we inſiſt that the *Livery was void*, becauſe the Leſ-

ſees

‡ fees were in Poſſeſſion BY *the* DEED. For if Tenant for ‡ Page 88.
Life has a Power to make Leaſes for Lives, and makes a Leaſe for Life *by Livery*, the *Livery is void*; becauſe the Leaſe *takes Effect* BY *the* DEED: For *by Sealing the Deed*, the Power is executed. 2 *Levinz* 149. *Wigſon and Garret*, 1 *Ventris* 291. *The Earl of Leiceſter's Caſe*. And the *Livery being void*, the Leſſees were NEVER *in* POSSESSION: For it is found by the Verdict, That the Leſſees or Either of them were never in Poſſeſſion *otherwiſe* than BY *the* LIVERY.

And as the *Leaſe* was no Impediment, ſo the *Jointure* could be none. For it is found "That Dame *Ann* being "in Poſſeſſion by Virtue of the Deed of Appointment, and "claiming the Eſtate for her Life for her Jointure, an "Ejectment was brought on the Demiſe of Sir *R. A.* the "Son and *J. Walker* his Truſtee, againſt Dame *Ann* and "the Tenants in Poſſeſſion, for the Recovery of the Eſtate; "and that there was a Verdict for the Plaintiff, and Judg-"ment on it." And "That a Writ of Poſſeſſion was "awarded; and that ſoon after the Judgment, and during "the Life of Dame *Ann*, Sir *R. A.* the Son *entered* into, "and was *in Poſſeſſion* of the Eſtates; and that he *continued* "*in Poſſeſſion* to the Day of his Death." By this, it appears that the *Jointure and Poſſeſſion of Dame Ann* was REMOVED *out of the Way*.

It can be no Objection to the Legality of Sir *R. A.* the Son's Poſſeſſion, "That the Judgment was not executed "by a *Writ* of Poſſeſſion:" Since ſomething equivalent to it is found, *viz.* "That ſoon after the Judgment, Sir *R. A.* "the Son entered into and *was in* Poſſeſſion of the Eſtate." And there is no Rule of Law more uncontroverted, than "That a Recoveror may enter without a writ of Executi-"on, where the Demand is certain." The Demandant after Judgment in a Common Recovery, may enter, *or* take out Execution at his Election. *Shelley*'s Caſe, 1 *Rep.* 106. *Mary Portington*'s Caſe, 10 *Rep.* 38. Conuſee may execute a Fine executory (which does not take Effect *till* Execution) *by Entry*. *Bro.* Tit.——The Plaintiff may have a Rediſſeiſin, on the Statute of *Merton*, *c.* 2. (which gives it after a Recovery in an Aſſize of *Novel Diſſeiſin* and *Delivery of Seiſin by the Sheriff*,) as well where He executes the Recovery by *Entry*, as where the Sheriff delivers Seiſin to him. The Patron who recovers in *Quare Impedit*, may preſent, without a Writ to the Biſhop. *Hutton* 66. *Rudd* v. *Biſhop of Lincoln*. And the Leſſor of the Plaintiff may *enter*, after Recovery in Ejectment. 2 *Sid.* 156. *Sir Robert the Son* being *thus in Poſſeſſion* of the Eſtate; and the Poſſeſſion which is found to *have been* in *Dame Ann*, having *been removed*: The Effect and Operation of the Feoffment, comes next in Order, to be conſidered.

But

‡ Page 89. ‡ This had been intimated by One of the Judges, at the End of the ſecond Argument.

‡ But Mr. *Knowler* ſaid, He would, out of the reſpect due to what came from the Court, take Notice of an ‡ Intimation of one of their Lordſhips, expreſſing a Deſire to hear it argued hypothetically, *ſuppoſing* the leſs Deed to have been firſt Executed, and *ſuppoſing* the Powers to have ſubſiſted and to have been well executed, and conſequently that Sir *R. A.* the Son was only Tenant in Tail *in* REMAINDER; What would be the *Effect* of the *Entry* of ſuch Tenant in Tail *in Remainder*, under or in Conſequence of a Judgment in Ejectment.

And He hoped, he ſaid, to make it appear beyond Controverſy, That Sir *R. A.* the Son, after his Entry in conſequence of the Judgment in Ejectment, became Tenant in Tail *in* POSSESSION; *i. e.* became ſeiſed of an Eſtate Tail EXECUTED.

The Gentlemen who have argued for the Leſſor of the Plaintiff, have called the Poſſeſſion of Sir *R. A.* the Son a *naked* Poſſeſſion. But he, to maintain *his* Poſition, would ſhew that the RIGHT of Poſſeſſion was in Sir *R. A.* the Son.

There is a found Diſtinction in Law, between a *naked* Poſſeſſion, and a *Right* of Poſſeſſion. A *Diſſeiſor* has only a *naked* Poſſeſſion: The *Diſſeiſee* has the *Right* of Poſſeſſion; For he may enter upon the Diſſeiſor. But when a *Deſcent* is caſt, the Right of Poſſeſſion is no longer in the Diſſeiſee; but is in the Heir of the Diſſeiſor: For the Diſſeiſee cannot enter upon the Poſſeſſion of the Heir. So that a *Right of Poſſeſſion*, and a *Right of Entry* are convertible.

A *Judgment* is an *Act of Law:* And WHILST *it continues in Force*, it *deſtroys the Title* of the *Adverſe* Party. A *Judgment in Ejectment*, by which only the *Poſſeſſion* is recovered, not only *deſtroys* the Right of Poſſeſſion which *was* in the adverſe Party; but GIVES *a Right of Poſſeſſion* to the Recoveror. And if the Judgment in Ejectment did not produce this Effect, the Leſſor of the Plaintiff could not *enter*, or be *intitled to the Writ of Habere facias Poſſeſſionem:* But his having a *Right to enter* and to *ſue out that Writ*, *infers* his Right to the *Poſſeſſion*. WHILST *the Judgment ſtands in* FORCE, it *removes* an intervening Eſtate out of the Way: And *during* that Time, 'tis the ſame thing *as if it had never exiſted*. And the Recoveror's Right to the Poſſeſſion will *continue* till the Judgment is *reverſed* by Error, or *falſified* in another Action. Like the Caſe where the Tenant in Tail ſuffers an erroneous Recovery; ſo long as the Recovery remains in Force, it is a Bar to the Tail, and the Iſſue in Tail has no Right to the Eſtate Tail: For if the Tenant in Tail ſhould diſſeiſe the Recoveror, and die, the Iſſue would not be remitted; becauſe he has but One Title to the Land, (which is the Title by Deſcent;)

And

† And there must be two Titles in the same Person to make a Remitter. *Co. Litt.* 349. *a.* † Page 90.

Now the Consequence of this is, That the *Right to the Possession*, and the *Remainder in Tail*, meeting in the SAME *Person*; and that Person being Sir *R. A.* the Son; the Possession and the Remainder in Tail UNITED, and Sir *R. A.* the Son became seised of an Estate Tail EXECUTED, or (in other Words) of an Estate Tail in *Possession*.

If the *Nature of an Action of Ejectment*, and the Consequences resulting from a Recovery in it, be considered, this will appear in a clearer Light.

An Ejectment is a *possessory Action*; in which almost all Titles to Land are tried: Whether the Party's Title is, to an Estate in Fee, Fee Tail, for Life, or for Years, the Remedy is by One and the same Action. In an Action of Ejectment, the Plaintiff recovers *only* the Possession of the Land: And the Execution is, of the Possession *only*. But if the Lessor of the Plaintiff recovers ONLY *the Possession* of the Land, it may be asked "*How* he becomes seised *according to his Title*." To which it may be answered, That when a Person is in Possession *by Title*, (as every Person is, who enters in Execution of a Judgment in Ejectment, because the Law does no wrong,) the Possession and Title *unite*. For it is a Rule of Law, "That "when a Man, having a Title to an Estate, comes to the "Possession of it *by lawful Means*, He shall be in Possession "ACCORDING *to his Title*:" As where the Title is to have a Fee, he becomes seised in Fee; Where the Title is to have an Estate Tail, he becomes seised of an Estate Tail; and so on; The *Law* casting the Estate upon him *according* to his Title. And were it not so, an Ejectment would be the most ineffectual Remedy for the Trial of *Titles* to Estates: And it would never answer the Purpose for which it was brought into Use, if (as the Counsel on the other Side would have it) the Lessor of the Plaintiff had *no more than a bare* Possession, *after* an Execution or Entry on a Judgment in Ejectment. But this is not all. For a great *Absurdity* would follow, were it otherwise: A Man would have a rightful possession, with an *immediate* Remainder to *himself in Tail*; A Notion which never existed, till this Case came to be debated.

What is it that converts an Estate Tail in Remainder into an Estate Tail *executed*, in any Case? Certainly, Nothing more or less than the POSSESSION's *coming* to the Remainder in Tail. For if there is Tenant for Life with Remainder to a third Person in Tail, Nothing comes to the Remainder-Man upon the Death of the Tenant for Life, *but* the Possession: For the Estate Tail was in him *before*.

And

† Page 91. † And *whilſt* the Eſtate Tail *continued* EXECUTED, Sir *R. A.* the Son made the Feoffment to *James Earle:* which diſcontinued the Tail, and veſted a deſeaſible Fee in him: And the *Præcipe*, upon which the Common Recovery was ſuffered, being brought againſt him; and Sir *R. A.* the Son being a Party to the Common Recovery, as Vouchee; The Common Recovery, thus circumſtanced, *barred* the Eſtate Tail and the Remainders over.

And though Dame *Ann* falſified the Recovery *in Ejectment* brought by Sir *R. A.* the Son, by the Judgment in the Ejectment afterwards brought by herſelf, Yet that Falſification had *no other* Effect upon the Eſtate, than to revive HER *Right to the Poſſeſſion.* Like the Caſe juſt now cited, of an erroneous Common Recovery ſuffered by the Tenant in Tail; where, if the Iſſue in Tail reverſes the Common Recovery by a Writ of Error, the reverſal revives *his Title to an Eſtate Tail*; and conſequently He is then Tenant in Tail, by Remitter. So that Dame *Ann*, by Means of the Recovery in the Ejectment brought by herſelf, having the Right to the Poſſeſſion, *became Tenant for Life* AGAIN, in Poſſeſſion; with a *Remainder* IN FEE thereupon expectant TO *the* RECOVEROR in the *Common* Recovery, or to the Perſon to whoſe Uſe the *Common* Recovery was declared.

That Eſtates may *open and ſhut*, or be *ſpread and expand*, AS *Events happen*, is not unuſual in our Law. If an Eſtate is limited to *A.* for Life: Remainder to his firſt and other Sons in Tail; Remainder to *A.* and the Heirs of his Body. *Till A.* has Iſſue, He is ſeiſed of an Eſtate Tail *executed:* Upon the Birth of a Son, that Eſtate *opens*, and lets in the Son; and *A.* thereupon becomes a Tenant for *Life*, with Remainder to his Son in Tail. And this was *Lewis Bowle's* Caſe, 11 *Co.* 80. So if Lands are limited to *All* the Children, either in Poſſeſſion, or Remainder; Upon the Birth of the *firſt* Child, the whole Eſtate veſts in Him or Her; Upon the Birth of *another* Child, the Eſtate *opens*, and takes in *that* Child; and opens in like manner on the Birth of *every* other Child. 1 *Ld. Raym.* 310, 311. *Earl of Suſſex* v. *Temple.* 2 *Vern.* 525. *Cook* v. *Cook.*

But the Reſolution of the Queſtion now under Conſideration does not altogether depend on the QUANTITY *of the Eſtate* which Sir *R. A.* the Son *had*, at the Time when he made the Feoffment: It depends on the QUALITY *of the* CONVEYANCE he *made Uſe of.*

All the Gentlemen who have argued this Caſe on the other Side *have blended and confounded* the SEVERAL OPERATIONS *of* DIFFERENT CONVEYANCES; and have not conſi-

dered

* dered them with that *Diſtinction and Preciſion* that is neceſ- *Page 91.
ſary for the Solution of the preſent Queſtion. If due Attention were given to the *Operation* of the ſeveral Conveyances which the Law has eſtabliſhed, the ſeeming Difficulties of this Part of the Caſe would be removed.

ALL *Conveyances* OPERATE AS *a* FEOFFMENT, OR AS *a* GRANT.

A FEOFFMENT operates on the *Poſſeſſion*; *without* any Regard to the Eſtate or Intereſt of the Feoffor. A GRANT operates on the Eſtate or Intereſt which the *Grantor has* in the Thing granted. But, to be more particular—According to Lord *Coke*'s Enumeration, a Man may purchaſe or convey Lands by *Ten* Manners of Conveyance; *viz.* by *Feoffment, Grant, Fine, Common Recovery, Exchange, Releaſe, Confirmation, Grant of Reverſion with Attornment, Bargain and Sale, Will.*

To make a *Feoffment* good and valid, Nothing is wanting, but *Poſſeſſion*: And where the Feoffor has Poſſeſſion, though it be *as* BARE *and* NAKED as the Gentlemen would have it, yet a Freehold or Fee-Simple *paſſes*, by reaſon of the *Livery*. *Poph.* 39. *Litt. ſ.* 595, 599, 611, 698. *Co. Litt.* 366. *b.* 367. *a.*

A *Grant* paſſes Nothing but what the Grantor may LAWFULLY *grant*. *Poph.* 39. *Litt. ſ.* 608.

A *Fine* and *Common Recovery* are likened to a Feoffment: For One is *called* a Feoffment of Record, and the other is ſaid to be in *Nature* of a Feoffment of Record. That which *occaſions* the *Likeneſs* between a Feoffment, Fine and Recovery, is, That they ALL PASS A FEE; THOUGH the Feoffor, Conuſor, or Tenant HAVE none. *Co. Litt.* 9. *b.* But, to give them this uniform Operation, the Conuſor in the Fine, and the Tenant to the *Præcipe*, muſt be ſeiſed of a *Freehold*; *i. e.* an Eſtate for Life, at leaſt: Otherwiſe, the Fine may be avoided, by the Plea of "*Partes Finis* "*nil habuerunt*;" and the Recovery, by the Plea of Nontenure, *i. e.* "That the Perſon againſt whom the Writ "was brought, was not Tenant of the Freehold, by *Right*, "or by *Wrong*." By this, it appears that a *Fine* and a *Common Recovery* are both void, for *want of a Freehold*: But it no where appears, notwithſtanding what has been urged, that an *Eſtate* in the Feoffor, is neceſſary, to ſupport a FEOFFMENT. But it does appear, and I have a great Authority for it, that it is *no Plea*, in Avoidance of a Feoffment, to ſay "That the *Feoffor has Nothing* in the Land, "at the Time of the *Feoffment*;" becauſe the *Land paſſes by the* LIVERY: If the Operation of the Feoffment is queſtioned, the *only* Plea is "*N' enfeoffa pas*;" which puts in Iſſue *only the* LIVERY. This is the Opinion, and this is the Language of *Littleton*. 10 *Ed.* 4, 8, 9.

ALL

* Page 93. * ALL OTHER *Conveyances*, as *Exchange*, *Releaſe*, *Confirmation*, *Grant of Reverſion*, *Bargain and Sale*, *Will*, paſs nothing but what the Grantor may LAWFULLY *convey*, WITHOUT *Livery*; and, on that Account, are in the *Nature of a Grant*. *Litt. ſ.* 600, 607, 609, 610. *Hardr.* 410. *Edwards* v. *Slater*. It is the Operation of THESE Conveyances, that the Gentlemen, in the Courſe of their Argument, have APPLIED *to a* FEOFFMENT: But with what *Propriety*, is ſubmitted to the Court, upon what is now diſcloſed.

But it has been ſaid, "That ſuch a Feoffment as this, may "be made *by* ANY *Perſon in* POSSESSION; and if eſta-"bliſhed, will introduce a NEW *Law* in *Weſtminſter-hall*, "CONTRARY *to all* FORMER Rules and Doctrines."

To which Objection, The Anſwer is, "That it is moſt "clear that a Feoffment MAY *be made by* ANY *Perſon in* "POSSESSION:" For 'tis the Doctrine the *Law* teaches; and it has been the Language of the *greateſt Profeſſors* of it. Lord *Coke*, in his Comment on the 25th Chapter of *W.* 2. (which gives a Writ of *Novel Diſſeiſin*, where Tenant for Years, aliens in Fee, by Feoffment,) grounds his Diſtinction between Caſes which are within the Act and Caſes which are not within the Act *on* POSSESSION ONLY. For he ſays, "Though the Act ſpeaks of an Alienation by Feoffment, by "a Tenant for Years; Yet it *extends* to Tenant by *Elegit*, "Statute-*Merchant*, Statute-*Staple*. Tenant at *Will*, and Te-"nant at *Sufferance*; BECAUSE All theſe have a POSSESSI-"ON: But it is otherwiſe of a Bailiff; For he hath no POSSES-"SION *at all*." This ſhews how greatly One of the Gentlemen is miſtaken, when He aſſerts "That a Conveyance of an "Eſtate of Freehold, by a Tenant *at Sufferance* would be † V. ante, pa. 80. "VOID †:" Since it appears by the Statute, and by the Comment upon it, "That a Feoffment by a Tenant *at Suf-"ferance* (who has no more than a bare Poſſeſſion) will un-"queſtionably paſs a Freehold." And the Caſe of *Butler* v. *Buckmanton*, *Cro. Jac.* 169. proves no more than that the Releaſe of Tenant in Tail to a Tenant at Sufferance, is not good for want of a Privity between them. Beſides, a Releaſe, (as has been already obſerved,) paſſes no greater Eſtate than the Releaſer can *lawfully* convey.

Lord Chief Juſt. *Holt* lays it down as clear Law, in the Caſe of *Hunt* v. *Burn*, *H.* 1 *Annæ*, "That if Leſſee for "*Years* makes a Feoffment *with Livery*; though the Leſſor "be on the Land, proteſting againſt it, yet the Land paſ-"ſes; *becauſe* the Leſſee was intitled to the *Poſſeſſion*." And Lord Ch. Juſt. *Holt* is ſupported in his Opinion, by the Caſe of *Read and Morpeth* v. *Errington*, *Cro. Eliz.* 321. where the Queſtion was, "if a Feoffment by Leſſee for

Years,

" *Years*, the Leſſor being upon the Land, was a good " † Feoffment:" For it was pretended that his being upon † Page 94.
the Land guarded the Land, ſo that no Feoffment could be made. But the Court was of Opinion that the Feoffment was good; " *becauſe* the Leſſee had the ſole Right to the Poſ- " SESSION; and Livery ought always to be given of the *Poſ-* " *ſeſſion*."

Notice has been already taken, that it is *no Plea* in Avoidance of a Feoffment, to ſay " that the Feoffor had Nothing in " the Land at the Time of the *Feoffment*." Let Us here add the *Form of Pleading a Feoffment*, by Tenant for *Life*, and Tenant for *Years*; Good Pleading being an infallible Teſt of the Law. If Feoffment in Fee is pleaded by Tenant in Fee, the Concluſion is " That the Feoffee was by virtue thereof ſeiſed " in Fee:" And the *ſame* Concluſion is made on the Feoffment in Fee of the Tenant for Life and Tenant for Years, " that by Pretext thereof the Feoffee was ſeiſed *in Fee*." The Entry of *Albany*'s Caſe in 1 *Rep.* 108. is a Proof of this.

It appears by *Jenning*'s Caſe in the 10th *Rep.* 43. " That " the Feoffee of Leſſee for *Years* was a *good* Tenant to the " *Præcipe*." In the Caſe of *Smith* v. *Parkhurſt*, or *Dormer* and *Forteſcue*, it was admitted that there *would have been* a good Tenant to the *Præcipe*, *if* Mr. Juſt. *Dormer* had made a Feoffment. And the Queſtion in Sir *William Pelham*'s Caſe, 1 *Co.* 14. *b.* is an Admiſſion " that the Feoffment of Leſſee " for *Years* will *paſs a Freehold*."

" That *Poſſeſſion* ONLY would ſupport a Feoffment," was the Doctrine at *Weſtminſter-Hall*, in *Elder* Times. In *Perkins* (a Book of no mean Authority,) Section 200. it is laid down as a Rule, " that WITHOUT *Poſſeſſion* a Man cannot make " Livery." A Feoffment by the Leſſee for Years, though the Leſſor be upon the Land, paſſes the Land: And the Reaſon for this is rendered in the Book; " *becauſe* the Leſſor had " nothing to do with the POSSESSION."

It was the Law, when Lands were deviſable only by Cuſtom, that a Man might deviſe " That his Lands ſhould be " ſold by his Executors." In which Caſe, the Lands deſcended, upon the Death of the Teſtator, to his Heir at Law: And the Executors took no Intereſt by the Will. *Babington*, a learned Judge, in putting this Caſe, and taking Notice of the Feoffment of the Executors, makes this Remark: " *And* " *ſo*," ſays He, " A Man may have a *lawful Freehold*, from " a Perſon who *had Nothing* in the Land; as a Man may " have Fire from a Flint, which has no Fire in it." And he further illuſtrates his Concluſion, with the Inſtance, " that a " Woman ſhall recover her Dower (which is an Eſtate for " Life) againſt a Guardian in Chivalry, who *has no* Freehold." 9 *H.* 6. 24.

‡ Page 95. ‡ In 10 *H.* 8. 10. It is mentioned as a Thing notorious, "That thoſe *who have no* Freehold *may convey* a Freehold." The Conveyance which will paſs a Freehold from a Perſon who has none, *muſt neceſſarily* be a *Feoffment:* Since there is NO OTHER *Conveyance* in the Law, which will produce the like Effect.

Before the Statute of Uſes, a *Ceſtuy qui Uſe* conveyed the Uſe by Bargain and Sale; and afterwards levied a Fine to a Stranger. And the Queſtion was, Whether the Fine was not void; as neither of the Parties had any Thing in Uſe or in Poſſeſſion: For by the Bargain and Sale, the Uſe was in the Bargainee; and Nothing was in the Bargainor, or in the Stranger. It was argued that if this Fine was not good, great Inconvenience would follow: For that many Recoveries had been ſuffered againſt the Bargainor, after he had conveyed the Uſe. To this *Fitzherbert* replied, "It is the Folly of "Purchaſors, that they do not take a FEOFFMENT from "the *Ceſtuy qui Uſe*, before the Fine is levied: For IF they "do, the FINE *will be* GOOD. I, for my part, ſays He, "will never purchaſe any Land WITHOUT *taking a Feoff-* "*ment*; So THAT I may be in *Poſſeſſion* when the Fine is "levied: For *then* the Fine will undoubtedly be good." 27 *H.* 8. 20. The POSSESSION here ſpoken of, muſt be a *Freehold* at leaſt; becauſe *Nothing leſs* than a *Freehold will ſupport a Fine:* For if neither Conuſor or Conuſee have an Eſtate of Freehold in *Poſſeſſion*, *Remainder*, or *Reverſion*, at the Time of levying the Fine, the Fine is void. The FEOFFMENT here ſpoken of, is the Feoffment of a *Ceſtuy qui Uſe*, *after* He had parted from the Uſe, and whilſt the *Freehold and Inheritance* of the Eſtate was in the *Feoffees:* So that it was the Feoffment of a Perſon who had ONLY *a* BARE *and* NAKED Poſſeſſion (*unaccompanied with* RIGHT,) to a Stranger. The Feoffment could not have been made good by the Statute of 1 *R.* 3. *c.* 1: becauſe, *after* the Bargain and Sale, the Uſe was in the Bargainee; and the Feoffor was no longer *Ceſtuy qui Uſe*. This was the Opinion, and this was the Practice of one of the greateſt Lawyers of the Age in which he lived: For it is ſaid, that *Fitzherbert* and *Baldwyn* were the greateſt Lawyers of that Age. The Obſervations upon the Opinion of *Fitzherbert*, are, That if a Feoffment from the *Ceſtuy qui Uſe* to a Stranger, *after* He had conveyed the Uſe, would have made the *Fine undoubtedly good*; the LIKE *Feoffment* would have made a *good* TENANT TO THE PRÆCIPE: And for this plain Reaſon; "becauſe the *Feoffment* PASSED *a* FREEHOLD." How would this great Judge have been ſurprized, to have heard the Operation of a Conveyance which *He* relied on as the *Baſis* of his Titles to his Eſtates, doubted and debated: This Caſe is an additional Authority, "that the Feoffment "of a Tenant *at ſufferance* will paſs a Fee." For *after* the *Ceſtuy*

* *Ceſtuy qui Uſe* had conveyed the Uſe by Bargain and Sale, * Page 96.
He was *no longer* a Tenant at *Will*, to his Feoffees. It is likewiſe a Proof "That the Feoffment of a *Deforceor*, who "is a *wrongful with-holder*, *paſſes a Fee.*" For *after* the Bargain and Sale, the *Ceſtuy qui Uſe* had *no Right to the Poſſeſſion*; but was a *wrongful with-holder*. Upon this, It is ſubmitted, Whether the *Confirmation* of this Doctrine, by the Judgment of the Court, will *introduce a* NEW Law into *Weſtminſter-hall*, CONTRARY *to all* FORMER Rules and Doctrines; Or whether it will not rather REVIVE *a Doctrine* almoſt worn out of Memory. It is ſo long ſince a Feoffment was in Common Uſe, that it is no wonder the Gentlemen ſhould think the Doctrine NEW; and that the PROPERTIES *of a Feoffment* ſhould be ſo little known.

But it has been ſaid "That the Feoffment of Tenant in "Tail *in Remainder expectant* upon an Eſtate for Life, will "NOT *make a* DISCONTINUANCE; *though* the Feoffment "was made with the Conſent of the Tenant for Life:" And for this the Caſe of *Swift* v. *Heath*, *Carthew* 109, 110. was cited. This muſt be admitted; Becauſe a Feoffment does *not* make a *Diſcontinuance*, *unleſs* the Tenant in Tail is ſeiſed of the Eſtate Tail, in *Poſſeſſion*. But does this Caſe prove "That a Feoffment by a Remainder-Man with the Conſent "of the Tenant for Life, *is* VOID?" Nothing leſs. The Queſtion, in the Caſe cited, "Whether the Feoffment *made* "*a Diſcontinuance*," *admitted* the Feoffment to *be* GOOD: For the Doubt was upon the *Operation* of it.

To put an end to the Queſtion, There is a Caſe, in which it was determined "That the *Feoffment of him in Reverſion or* "*Remainder*, in the ABSENCE *of the Tenant for Life*, IS *a* GOOD "Feoffment." It is in *Dyer* 340. The Caſe was, That he in Remainder in Fee enfeoffed a Stranger in the Abſence of the Tenant for Life; who neither attorned, nor aſſented to the Feoffment, but occupied the Eſtate, during his Life: And it was holden to be *a* GOOD *Feoffment* for the Fee-ſimple. Where is the Difference between this Caſe, and the preſent? In the Caſe before the Court, was not the Feoffment made by the Remainder-Man, in the Abſence of Dame *Ann*, the Tenant for Life? Did ſhe ever attorn, or aſſent? And did not She occupy the Eſtate, during her Life? The only Difference that can be pretended between the two Caſes, is, that in One, the Remainder-Man was Tenant in Fee; in the other, Tenant in Tail. But will *that* make any Difference? 'Tis impoſſible it ſhould: Becauſe the Feoffment in both Caſes, took Effect by the *Livery*.

It has been further ſaid, "That Sir *R. A.* the Son could "not convey a Freehold by a *rightful* Conveyance; as by "Fine, Releaſe, or Bargain and Sale: And *if not* by a "rightful, he could not do it by a *wrongful* One."

† Page 97. † Here is a Diſtinctiom made, which was never met with. According to their Notion of Inſtruments of Conveyance: a Fine, Releaſe, and Bargain and Sale, are *rightful* Conveyances: A Feoffment, a *wrongful* One. Whereas it is moſt manifeſt, that ALL *Conveyances*, are in themſelves EQUALLY *rightful*, and are to be made uſe of, according to the Nature of the Caſe to which they are applicable: And their being rightful or wrongful, does not depend upon their Names or their Properties. That a Freehold will not paſs, by a *Fine*, *Releaſe*, or *Bargain and Sale*, from a Perſon who has ONLY a BARE *and* NAKED *Poſſeſſion*, (for *that* is the Subject We are now upon,) does not proceed from thoſe Conveyances being *lawful* Ones; but from the *Nature* of thoſe Convevauces; whoſe *Property* it is to convey Nothing but what the Maker of them may *lawfully* convey; *becauſe they operate as a* GRANT. Therefore, to infer *from thence*, "That a Freehold will not paſs by a FEOFFMENT," a Conveyance of a *different Operation*, and *whoſe Property* is to paſs a Freehold and Fee, *by Force of the* LIVERY, is an inconcluſive Argument.

Another Obſervation has been made, "That if the Law "conſiders that *ſome* Perſons have this Power, (to make a "Feoffment,) and *others* have not; the Law will never ſuffer "that to be done by *Fraud*, which cannot be done fairly and "regularly."

Anſwer, *Every* one who *can* GET INTO POSSESSION, has and ever had a Power *to make a Feoffment:* And the Law makes no Diſtinction of Perſons. And whenever a Tenant *in Tail in Remainder* has *obtained the* POSSESSION, *(whether by Right*, or *by Wrong*,) and has done an Act, *whilſt in Poſſeſſion*, to make a Tenant to the *Præcipe*, in order to ſuffer a Common Recovery; No Inſtance can be produced, where ſuch Act has been *adjudged fraudulent*, *unfair*, or *irregular*.

It is very common, in Practice, for Tenant for Life to ſurrender his Eſtate to the Remainder-Man in Tail, *conditionally*; in order to give the Tenant in Tail in Remainder an Opportunity to bar the Eſtate-Tail and the Remainders over: And though ſuch Surrender is a *mere Contrivance* between the Tenant for Life and the Remainder-Man in Tail, yet no Common Recovery was *ever avoided* on *that* Account.

If Tenant in Tail in Remainder *diſſeiſes* the Tenant for Life, and during the Continuance of the Diſſeiſin ſuffers a Common Recovery; By their own Admiſſion, the Common Recovery is *not avoidable* by Reaſon of the *Diſſeiſin*. So where Truſtees to preſerve contingent Remainders during the Life of a Tenant for Years, have conveyed the Freehold, to make a Tenant to the *Præcipe*, in order to

give

† give the Remainder-Man in Tail an opportunity of suffering a Recovery; there is no Instance of *such* a Recovery being *set aside* at Law, upon a *supposed Practice* between the Tenant for Years, the Trustees and the Remainder-Man in Tail. And if a Remainder-Man in Tail, who comes *to the Possession* by a *wrongful Act*, or by *Stratagem* and *Contrivance*, may make a Tenant to the *Præcipe*, in order to suffer a Recovery; Surely, a Remainder-Man in Tail who comes to the Possession by a *Lawful* Act, may do the same. † Page 98.

Where *Tenant in Tail is Party* to the Recovery as Tenant or as Vouchee, Such Recovery is not in the Eye of the Law either fraudulent or collusive: Because the LAW *has made* the Estate-Tail, and all the Remainders, and the Reversion expectant on it, *subject to the* PLEASURE *of the Tenant in Tail*, and *given* HIM *a* RIGHT *to* BAR THEM ALL. *If* a Reversioner expectant upon an Estate-Tail *could avoid* a Recovery suffered by the Tenant in Tail, AS *fraudulent*, *collusive*, *unfair*, or *irregular*; the *Law would have* devised some *Means* for avoiding it: And the Reason why there are NO such Means, is, because a *Reversion* expectant on an Estate-Tail is of no Consideration in Law. A Reversion expectant on an Estate-Tail is *no Assets*. The Reversioner cannot FALSIFY a Common Recovery suffered by Tenant in Tail: Neither is *Resceit* given by the Statute of *W.* 2. *c.* 3. to a Reversioner on an Estate-Tail. The Reason of all this is, *because* the Estate Tail is an Inheritance which *may* continue for ever. There is *no Provision* by the Statutes of 32 *H.* 8. *c.* 31. and 14 *Eliz. c.* 8. to *preserve* a Remainder or Reversion expectant on an Estate *Tail*; as there is, when they are expectant on an Estate *for Life*, and the Tenant for Life only is vouched.

But *Fermor's* Case, 3 *Co.* 78. has been objected: As if there was no Difference between a Fine or Recovery *by* Tenant for *Years*, Tenant for *Life*, or a *Copyholder*, by Covin, to the Intent to bar the Reversioner or the Lord of his *Inheritance*; and a Recovery suffered by *Tenant in Tail*, to the Intent to bar the *Estate Tail and the Reversion*.

It has been Matter of Surprise, to hear the Gentlemen mention the Statute of 14 *G.* 2. *c.* 20. Because that Statute is made in *Aid* of Recoveries; and *not* to invalidate them; and more especially, as there is a Proviso in the Act, "that it "shall not be construed to prejudice or affect any Question in "Law, which may arise upon Common Recoveries not remedied or intended to be remedied by it: But all *such* Common "Recoveries are to remain and be of such Force and Effect "as they would have been, if the Act had not been made." Besides, there is a Proviso in the Act "that no common Recovery shall be called in question *after* 24 *Years*."

The

† Page 99. † The principal Argument which the Gentlemen have oppoſed to the Doctrine which We have been endeavouring to ſupport, may be reduced to the Head of INCONVENIENCE: And they have argued upon it, as if the Deciſion of the Queſtion depended on *private Opinion*, and not on the LAW. But the Queſtion is *not*, "*What Inconvenience* will attend the De-"termination, either Way:" But WHAT *is the* LAW." The Inconvenience, (if there be One,) *ariſes* from the NATURE *and* OPERATION *of a* FEOFFMENT; and cannot be avoided, but by *taking away* that Conveyance, or *depriving* it of an Operation which it has been allowed to have, by all the Sages of the Law. But to do *this*, is NOT *in the* Power of a Court of Juſtice; Since no Maxim of the Common Law can be abrogated or aboliſhed, *but* by a LEGISLATIVE *Authority*.

It was *once* thought to be a great Inconvenience, "that a "Deſcent, *immediately after* a Diſſeiſin, *ſhould take away the* "ENTRY of the Perſon diſſeiſed." At another Time, It was thought to be no ſmall One, "that the *Son* ſhould *loſe his* "*Patrimony*, becauſe he happened to be born *out of Time*." And till lately, an *Heir might have been deprived of his Family-Eſtate*, by the *Warranty* of an Anceſtor who was *never in Poſſeſſion* of it.

The Inconveniences occaſioned by the Maxims I have juſt now hinted at, were *as great* as that which is pretended to ariſe from the Feoffment of a Tenant in Tail in Remainder expectant upon an Eſtate for Life; and yet they continued through Ages of the Law, *till* the LEGISLATURE took them away. The Inconveniences which attended the Law in thoſe Inſtances were as *univerſal* as any that can be ſuggeſted to follow from the Doctrine We have been endeavouring to ſupport: And yet *Courts of Juſtice* never thought themſelves *warranted to depart from the Law*.

Could the Courts of Common Law have determined "that "a Deſcent, after a *recent* Diſſeiſin, did *not* take away an En-"try:" without determining at the ſame time, "That a "Deſcent does NOT take away an Entry?" *Could* they have determined "that a Poſthumous Child *ſhould take*, though "the Eſtate which was the Support of the Limitation to "it, determined before its Birth;" without reſolving at the ſame Time "that a *contingent* Remainder ſhould take "Effect, though it did *not* VEST *during* the Continuance "or upon the Determination of the Eſtate created for its "Support?" Or *could* they have determined "that an Heir "ſhould take an Eſtate, *notwithſtanding the Warranty* of "his collateral Anceſtor;" without determining "That "Collateral Warranties did *not* bind?" And *can* the Court

† Court determine, in the preſent Caſe, "That the Recove- † Page 100.
"ry is *void*;" without adjudging "That a Feoffment has
"*not* the Operation, which it HAS HAD *ever ſince it* became
"a Common Aſſurance?"

When the Law is *doubtful*, it is allowable to draw an Argument from Inconvenience: But where the Law is *clear* and *preciſe* (as it is "That the Feoffment of a Perſon in Poſſeſſion, "let him come to that Poſſeſſion *how* he will, *paſſes a Fee*;") *An Argument from Inconvenience* is NOT *admiſſible*; becauſe it tends to undermine and overthrow the *Law*.

Much has been ſaid of DISSEISIN; and many critical Obſervations have been made upon that Subject, in Order to ſhew that Sir *R. A.* the Son could not be a *Diſſeiſor*. All that needs be ſaid to them, is, That Sir *R. A.* the Son entered by *Right* OR by *Wrong*; (For there is no Medium:) And, "that He entered and took the Profits," is admitted. Now IF He entered of his *own Wrong*, He was a *Diſſeiſor*; For he ouſted the Tenant for Life: And *if* He was a Diſſeiſor, it is agreed there was a good Tenant to the *Præcipe*. IF He entered by *Right*, then (for the Reaſons already offered) He *had Power* to make a Tenant to the *Præcipe* by his Feoffment. So that in *either* Caſe, *James Earle* was a GOOD Tenant to the *Præcipe*, at the *Time* when Judgment was given in the Common Recovery. And ſo he was warranted, He ſaid to conclude, That the Recovery is good, and barred the Eſtate Tail limited to Sir *R. A.* the Son; And conſequently the Remainder in Fee, which was limited to Sir *R. A.* the Father, and by him deviſed to the Leſſor of the Plaintiff.

The Fourth Point or Head.—Suppoſing the Recovery to be 4th Point.
good, Whether the RE-ENTRY *of Dame Ann*, under the Recovery and Judgment in the ſecond Ejectment, did AVOID it.

The Gentleman who made this Queſtion, ſaid "It ſeemed "to be of conſiderable Weight." Whether it be ſo or not, We ſhall ſee preſently. What He undertook to maintain, was "That the Entry of Dame *Ann*, after ſhe had recovered "in the ſecond Ejectment, REVESTED her Eſtate for Life "and the Remainder in Fee; and put the Eſtate in the SAME "*Plight* it was in before the Common Recovery was ſuffered." And to make this out, He compared the Entry of Dame *Ann* to the regreſs of the *Diſſeiſee*, which voids all intermediate Acts, by Relation; and made that Inſtance the Foundation of his Argument.

Mr. *Knowler* here obſerved, how inconſiſtent *this* Argument of the Gentleman was with his *former*. The Direction and Force of his former Argument under the laſt Head

was

*P. 101. * was to ſhew " That Sir *R. A.* the Son entered *by Title*, " and could *not poſſibly* be a *Diſſeiſor*." The Drift of *this* Argument is to prove him to *have been* a Diſſeiſor. This ſhews how difficult it is to be conſiſtent, when a Perſon would reconcile matters not ſupportable.

The Queſtion is not to be determined by the Rule or Inſtance which the Gentleman has applied to it; but upon *this Diſtinction*, " Where the *entire* Eſtate is defeated," and " Where " ONLY *Part* of the Eſtate is defeated, by One who has a " prior Title." The Caſe which the Gentleman puts, falls under the *firſt* Member of the Diſtinction: The *preſent* Caſe falls under the *ſecond* Member of it.

The ſubſiſting Eſtate, at the Time when Dame *Ann* entered under the Judgment in the ſecond Ejectment, was an Eſtate in *Fee* in *Robert Atkyns* the Nephew and Heir of Sir *R. A.* the Son. *All* the Intereſt that *She* could derive to *herſelf* by Force of the Judgment in the ſecond Ejectment, was an Eſtate for LIFE: For ſhe could recover no otherwiſe than *according to her Title*. And therefore Dame *Ann*'s Entry under that Judgment *could have no other Effect* than to *diminiſh and leſſen* the Intereſt of *Robert Atkyns*, *by taking out of it* an Eſtate *for* HER *Life*. This will appear by ſome Inſtances which ſhall be mentioned. Tenant for Life ſurrenders his Eſtate to the next Remainder-Man in Tail, *conditionally*; to enable the Remainder-Man to ſuffer a Common Recovery; A Recovery is ſuffered: And, the Condition being broken, the Tenant for Life will *not* avoid the Recovery, and revive the Eſtates that were barred by it. This appears by every Day's Experience. One of the Gentlemen ſeemed to admit the Law to be ſo; and accounted for it, by ſaying, " It is be- " cauſe the Tenant to the *Præcipe* was made by Force of a " rightful Eſtate." But *that* is *not* the Reaſon. The *true* Reaſon is (what has been already mentioned) " That ONLY *Part* of the Eſtate is defeated by the Entry of the Tenant for " Life; and *not* the ENTIRE Eſtate." A Tenant for *Years* or by *Elegit*, can avoid or falſify a Recovery, *during* their particular Eſtates *only*. A *Wife* can avoid a Recovery ſuffered by her Huſband alone, as to her Title of *Dower* only, and *no further*. Remainder-Man in Tail, expectant on an Eſtate for Life, diſſeiſed the Tenant for Life, and levied a Fine with Proclamations; the Tenant for Life entered on the Conuſee: And it was determined " that notwithſtanding the Re- " greſs of the Tenant for Life, the *Reverſion* re- " mained in the Conuſee, *not defeated*." And this was the Caſe of *Okes ex dimiſſ. Lord Sturton*; which is cited in *Popham* 65, 66. Leſſor diſſeiſes his Leſſee for Life, and makes a Leaſe for Life to another; The firſt Leſſee re-enters: He leaves the *Reverſion* in the ſecond Leſſee for Life;

* Life; who ſhall have the Rent reſerved on the firſt Leaſe. * Page 102.
Earl of *Glouceſter*'s Caſe, cited in Sir *Myle Finch*'s Caſe. *More* Proofs might be brought, to confirm this Part of the Argument: But in ſo plain a Caſe, *theſe* may ſuffice. And with them we may conclude, That the RE-*Entry of Dame Ann*, under the Recovery and Judgment in the ſecond Ejectment, *did* NOT *avoid* the Common Recovery ſuffered by Sir *Robert Aikyns* the Son.

And let it be obſerved, that the Arguments made Uſe of, have *not* been drawn from *General* Reaſons and Reflections: But have been ſuggeſted from AUTHORITIES, and from the EXPERIENCE AND PRACTICE *of Learned Men.*

Upon the whole, He prayed Judgment for the Defendants.

In Reply—It was urged on the Part of the Plaintiff—

1ſt, As to the great and little Deeds—That the little Deed did *not* revoke the greater One, or *deſtroy the Powers* thereby given. Which was ſupported chiefly by Arguments drawn from the Deeds themſelves: 1ſt Point.

As to the † Leaſe to the *Dacres* being fraudulent, (*V. ante* 85.) The Caſe in *Savile* 126. is not like the preſent: For *here* were *expreſs legal Motives* for making the Leaſe; whereas there were none, in that Caſe, for making the Feoffment. 2d Point.

† Here is a like Omiſſion as to the Argument concerning the Validity and Determination of the Leaſe to the *Dacres*, as in the adverſe Argument. See the Notes on p. 83, 87. l. 19. 104, & 135, in Margine.

As to *Livery*—It was not neceſſary; And therefore void. 1 *Ventr.* 291.

As to the Recovery———The Authorities are not *ad idem*: 3d Point.

Nor as to the *Feoffment*. For this is a FICTITIOUS *Poſſeſſion*, and *in Nubibus*: NOT an *actual* Poſſeſſion. No *Freehold* is recovered in Ejectment. So that Sir *R. A.* the Son was *not* Tenant in Tail *in* POSSESSION, for *want* of the *Freehold*. And without being Tenant of the Freehold, the Recovery could not be valid. Mr. *Knowler* admits "That the Poſſeſſeſſion of the *Bailiff* would not do." (*V. ante* 93.) And ſurely, this Caſe is ſtronger than that of Bailiff.

As to *Cro. Jac* 169 the Caſe of *Butler* v. *Duckmanton*. (*V. ante* 80. & 93.) The Poſſeſſion of the Tenant at *Sufferance* was conſidered as *no* Poſſeſſion at all, in that Caſe. Therefore We may admit all Mr. *Knowler*'s Caſes: Becauſe they do not come up to the preſent Caſe of Sir *R. A.* the Son's

‡ P. 103. ‡ Son's Poſſeſſion. Conſequently, The Remainder is not affected by any thing done under this *nugatory* Poſſeſſion.

Dame *Ann* was Tenant of the Freehold: And without diſſeiſing Her, there could be no Tenant to the *Præcipe*, who would be Tenant of the Freehold. Sir *R. A.* the Son did not enter *as* a Diſſeiſor; but as having a Title. And he had a Title under the Judgment, to enter. And the Eſtate which paſſed by the Feoffment, was according to the Right. 2 *Ro. Abr.* 5. *Co. Litt.* 52. *b.* And the Warranty extended only to the Fictitious Title in Ejectment. The Poſſeſſion *only* was transferred to Him; *not* the Freehold: And this was a mere *naked* Poſſeſſion; an *accidental* Poſſeſſion. *Carthew* 110. proves that the Remainders were not diſcontinued for want of Tenant to the Freehold. Dame *Ann* was never out of Poſſeſſion of the *Freehold.*

So that the Eſtate which Sir *Robert* gained by his Entry upon Dame *Ann* could not be an Eſtate Tail in *Poſſeſſion*; Becauſe there was a prior rightful Eſtate for *Life* in ANOTHER Perſon. Therefore it muſt be an Eſtate Tail in REMAINDER.

It is aſked, "*When* He *firſt* began to hold over unlawfully?" The anſwer is—From his *firſt Entry.*

His ENTRY was *not wrongful:* Therefore he cannot be conſidered as a *Diſſeiſor.* But He HELD OVER, *unlawfully.* 'Tis like a Tenant by Sufferance; or a Man who enters upon the King, (who cannot be put out of Poſſeſſion;) or a Huſband after the Death of his Wife, &c. And it is not eaſy to apprehend the Diſtinction between entering "*under* the "Ejectment;" and entering "in *purſuance* of the Ejectment." Conſequently, his was a *mere naked Poſſeſſion:* And the Freehold remained undiſturbed in Dame *Ann.*

As to the Fraud and Colluſion of Suffering a Recovery—— There is ſurely ſuch an *Inſufficiency of Eſtate* in a Tenant in Tail in Remainder, that He cannot ſuffer a Common Recovery. And ſurely the Court will not permit a Perſon who cannot be a Tenant to the *Præcipe Himſelf*, to MAKE a Tenant to the *Præcipe.* And they ſtrongly urged the vaſt *Inconveniences* that muſt attend this Doctrine now advanced, "That "a Tenant in Tail in *Remainder* only, who can obtain a mere "*naked* Poſſeſſion, may legally ſuffer a Recovery and bar the "ſubſequent Remainders."

4th Point. Fourth Point.——As to the RE-*Entry* of Lady *Ann*—The Verdict did nothing: It is the *Entry* that reveſts. It *reveſted* HER *Eſtate*, which was an Eſtate for *Life:* Whereas Sir *R. A.* the Son's Entry under his Verdict only operated to give him a *naked Poſſeſſion*; He having no Right to an Eſtate

† Eſtate Tail IN POSSESSION. And He could not be Tenant in Tail in *Poſſeſſion*, to *One* Purpoſe; and in *Remainder*, to *Another*. Then Her Re-Entry left him Tenant in Tail in Remainder, as it found Him. † P. 104.

In the Caſe in 2 *Ro. Abr.* 421. Title *Remitter*, Letter i. *pl.* 1. The Wife entered under an Act of Parliament, which remitted Her.

5th Point, (as to the Remedy.) The Plaintiff ‡ is NOT *barred* of his Entry; by the Statute of Limitations 21 *J.* 1. *c.* 16. For the Recoveree was not intitled to ſuffer a Recovery; Not being Tenant in Tail in *Poſſeſſion*. 5th Point. ‡ The Reſt of this Argument is omitted; for the Reaſons given in the ſubſequent Note.

As to Dame *Ann*'s Recovery in the Ejectment brought by *Miles*—The Demiſe was laid ſo far back as to over-reach the whole Term which Sir *R. A.* the Son had recovered: It was laid ſo far back, as to 5 Days after the Death of Sir *R. A.* the Father. And Her Eſtate had never been diſcontinued; nor her Right of Entry taken away. So that Sir *Robert* the Son was never Tenant in Tail in Poſſeſſion. The Leſſor of the Plaintiff could not therefore enter till the Jointure of Dame *Ann* was at an End, and her Life-Eſtate determined. Neither could he enter, ſo long as the Leaſe *to the* DACRES was in being: Which did not expire *till* the Death of *Thomas Dacres*, the Surviving Leſſee, on 23d *July* 1752.

Note—The laſt of the four Arguments of this Caſe was intended chiefly for the Information of Lord *Mansfield*, who had not heard any of the former.

BEFORE it came on, his Lordſhip (having read the Caſe, and ſeen Notes of all the former Arguments,) ſent for the Counſel and Agents on both Sides; and told them, that a Point occurred to Him, which did not ſeem to have been particularly attended to in drawing up the ſpecial Verdict, and which He obſerved had been very little gone into in any of the former Arguments; That it ſeemed to Him material; And therefore he wiſhed to have it ſpoken to: And He choſe to apprize them of it before-hand, to avoid further Expence and Delay to the Parties; becauſe if He ſhould defer mentioning it, till after He had heard them in Court, and if they ſhould omit going fully into that Point in their Argument, and his Lordſhip ſhould continue to think it material, it muſt occaſion a new Argument.

The Point was, " Whether, *ſuppoſing* the Recovery to be " bad, yet the Plaintiff's EJECTMENT was not *barred* by " the Statute of *Limitations*."

† P. 105. † *That* depended, He ſaid, upon many Conſiderations, which he deſired them to think of: As, firſt, Whether the *Leaſe* was made *purſuant to the Power*, or, (in other Words,) Whether the *Leaſe* was *void*, as *not* being made purſuant to the Power; (2dly) Whether it was not *determined*, upon the Extinction of the Eſtate Tail in 1711; (3dly) Whether, *as* this Special Verdict was found, an Objection from the Statute of Limitations was *now* open to be made. And He mentioned ſome Caſes to them, which he deſired them to look into.

Accordingly, upon this laſt Argument, the ſaid Queſtion was very fully diſcuſſed, on both Sides: But, to avoid Prolixity, I have omitted to report *theſe Arguments of the Counſel*; becauſe every thing material upon ‡ this Point will appear from the following unanimous Reſolution of the Court, given by Lord *Mansfield*.

‡ They fell under the 2d Point. See ante, pa. 83. in the Margin; and pa. 87. & 102.

Lord Mansfield now delivered the Reſolution of the Court; (Having firſt ſtated the Caſe and Special Verdict.)

Sir *Robert Atkyns* the Son being dead without Iſſue Male, the Reverſion in Fee, deviſed to the Leſſor of the Plaintiff, is come into Poſſeſſion: And conſequently, he muſt be intitled to Judgment in this Ejectment; unleſs the Defendants can ſet up a *Bar* to his Right, or to his Remedy by an Ejectment.

They ſet up a Bar to Both.

In Bar of his Right, they inſiſt upon the *Common Recovery* ſuffered in *Hilary* Term 9 *Ann. A. D.* 1710. In Bar of his Remedy, they inſiſt upon the *Statute of Limitations*.

The *Common Recovery*, if duly ſuffered, certainly deſtroyed the Right of the Leſſor of the Plaintiff. The *Statute of Limitations*, if his Title of Entry accrued above 20 Years, before the 15th of *December* 1752, has certainly taken away the Remedy by Ejectment.

The Merits therefore muſt depend upon two General Queſtions.

1ſt, Whether the ſaid *Common Recovery* was *duly ſuffered*.

2d, Whether this *Ejectment* is barred by the *Statute of Limitations*.

First General Queſtion.

As to the firſt, The Objection is, That there was *not* a good *Tenant to the Præcipe:* For, Lady *Atkyns* the Widow of

‡ of Sir *Robert* the Father, had an Eſtate for Life in the Premiſſes; and did not join, by Surrender or otherwiſe, in any Conveyance of the Freehold to *James Earle*, the Tenant againſt whom the *Præcipe* was brought. (There is no Occaſion to entangle this Part of the Caſe with the Demiſe to the 3 *Dacres*.) ‡ Page 106.

The Defendants contend that there *was* a good Tenant to the *Præcipe*, upon two Grounds; (1ſt Becauſe Lady *Atkyns* had no Eſtate for Life; and ſo Sir *Robert* the Son, was Tenant in Tail in *Poſſeſſion*; 2dly) Suppoſe She had an Eſtate for Life, yet *Earle* was a good Tenant to the *Præcipe*, by *Diſſeiſin*: Which they endeavour to prove two Ways, *viz.* 1ſt, That Sir *Robert Atkyns*, by his Entry, was *Himſelf* a *Diſſeiſor*, and by his Feoffment the 17th of *January* 1710, conveyed the Freehold he had *acquired by Diſſeiſin*, to *James Earle*; and 2dly, Suppoſe Sir *Robert* the Son was not a Diſſeiſor, yet his ſaid *Feoffment was a Diſſeiſin*, and made *James Earle* a good Tenant of the Freehold *by Diſſeiſin*.

As to the firſt Ground, " That Lady *Atkyns* had *no Eſtate for Life*,"—The whole Argument depends upon this Propoſition, " That the Leſſer Deed was executed *after* the " Greater Deed; and conſequently, the Power to Sir " *Robert Atkyns* the Father, to make a Jointure, was *ex-* " *tinguiſhed* by the Fine levied in *Trinity* Term 1669." But the Jury have not found the Fact, " *which* was *firſt* executed." Both Deeds bear the ſame Date. They are both conſiſtent. They are both manifeſtly but one Agreement, executed by different Inſtruments, to anſwer different Purpoſes, and to ſuit (probably) the Convenience of one Party, who was intereſted only in a ſmall part of the Tranſaction.

The Fine levied in *Trinity* Term 1669 purſued both Deeds, and comprizes all the Premiſſes in the greater Deed, by which the Powers were created.

It never could be the Intent to revoke theſe Powers, at the Inſtant they were created; by the leſſer Deed, which makes no Mention of them; or by a Fine levied, agreeable to the greater Deed, in which they are contained.

Sir *Robert Atkyns*, who ſurvived the Tranſaction above 30 Years, has ſhewn by many Acts, that he underſtood the Powers to be well created and ſubſiſting.

If it was neceſſary, We ought to preſume the leſſer Deed firſt executed, to ſupport the clear Intent of Parties, in a Family

‡ Page 107. ‡ Family Settlement made for valuable Conſideration; For it is impoſſible to ſuppoſe, they could really mean to revoke or extinguiſh thoſe Powers, and take this way of doing it. But, in this Caſe, there is no Room for Preſumption: The Internal Evidence of the thing itſelf, ſpeaks them to be one Tranſaction; and the ſame, to all Intents and Purpoſes, as if expreſſed in one Inſtrument.

As the Jointreſs clearly had an Eſtate for Life, the *next* Ground is "That *James Earle* was a good Tenant to the "*Præcipe*, by *Diſſeiſin*."

The better to judge of this Queſtion, It may be proper to try to find out What the *old Law* meant by a *Diſſeiſin* which conſtituted the Tenant of the Freehold, in reſpect of every Demandant ſuing out a *præcipe*; although the Owner's Entry was *not* taken away: (For where the *Right of Poſſeſſion* was acquired, and the Owner put to his real Action; *there* without doubt the Poſſeſſor had got the Freehold, though by Wrong.)

All the Law concerning Diſſeiſins, which is any way applicable to the preſent Inquiry, exiſted and was in Uſe and Practice, *before* the Aſſize of Novel Diſſeiſin. The *Aſſize* was introduced, (probably from the Uſage of *Normandy*, for the Grand Couſtumier treats of Aſſizes,) in or before the Reign of *Henry* the 2d. *Glanville*, who wrote in that Reign, calls the great Aſſize a Benefit "*Clementiam Principis, de Conſilio Procerum, Populis indultam:*" And the ‡ *Myrrour fo.* 93. ‡ C. 2. § 25. pa. 150. Edit. 1642. ſays "*Glanville* introduced it."

Seiſin is a technical Term, to denote the Completion of that Inveſtiture, by which the Tenant was admitted into the Tenure; and without which, no Freehold could be conſtituted or paſs. *Sciendum eſt Feudum, ſine Inveſtitura, nullo modo conſtitui poſſe. Feud. Lib.* 1. *Tit.* 25. *Lib.* 2. *Tit.* 1. 2 *Craig. Lib.* 2. *Tit.* 2.

DISSEISIN therefore muſt mean ſome Way or other turning the Tenant *out of* his Tenure, and *uſurping* his Place and Feudal Relation. At the Time I ſpeak of, *No* Tenant could alien *without Licence of the Lord.* When the Lord conſented, the only Form of Conveyance, was by Feoffment publicly made, *coram paribus Curiæ*, with the *Lord's Concurrence.* Homage, or Fealty, was ſolemnly ſworn; And Suit of Court and Services were frequently done.

The Freeholder repreſented the whole Fee, did the Duty to the Lord, and defended the whole Fee againſt Strangers.

The Freehold *never* could be in *Abeyance*; becauſe the Lord muſt never be at a Loſs to know upon whom to call, as his Tenant; nor a Stranger, at a Loſs to know againſt

† againſt whom to bring his *Præcipe*. From the Neceſſity of there being always a *viſible* Tenant of the Freehold, and the Notoriety *who* acted, and did Suit and Service *as ſuch*, many Privileges were allowed to innocent Perſons deriving Title from the Freeholder *de facto*. † P. 108.

If the *Diſſeiſor died*; after one Year's Non-claim, the Deſcent to his Heir gave *him* the *Right of Poſſeſſion*, and took away the true Owner's *Entry*. The Stat. of 32 *H.* 8. *c.* 33. requires 5 Years Non-claim. The Feoffee of a Diſſeiſor acquired Title of Poſſeſſion, at the Time I ſpeak of, by one Year's Non-claim. The Deſcent to *his* Heir remains privileged as it was at Common Law: for the 32 *H.* 8. *c.* 33. extends not to any Feoffee of the Diſſeiſor, immediate or mediate. *Co. Lit.* 256. *a.* The *Feoffee* of a Diſſeiſor was favoured; becauſe he came innocently into the Tenure, by a ſolemn and public Inveſtiture, with the *Lord's Concurrence*.

But the Statute * "*Quia Emptores Terrarum*," (which took in Subinfeudations, and gave free Liberty of Alienation to the Tenants of Subjects, and to thoſe who held of the King, as of an Honor or Manor;) and other Statutes which extended the Power of Alienation to the King's Tenant *in Capite*; The frequent Releaſes of Feudal Services; The Statutes of Uſes and of Wills; and, at laſt, the total † Abolition of all military Tenures; have left us little but the Names of *Feoffment*, *Seiſin*, *Tenure*, and *Freeholder*; without any preciſe Knowledge of the *thing originally ſignified* by theſe Sounds: The Idea *modern* Times annex to *Freehold*, or *Freeholder*, is taken merely from the *Duration* of the Eſtate. * 18. E. 1. V. Introduction to the Law of Tenures, fol. 153 to 157. † V. 12 C. c. 24. and 13 G. 2. c. 7.

Copyholds, and the *cuſtomary Freeholds* in the North, retain faint Traces in Imitation of the old Syſtem of Feudal Tenures. It is obvious how a Man may viſibly be the Copy-holder, or cuſtomary Freeholder *de facto*, in Prejudice of the rightful Tenant. It is obvious too, that *Uſurping* ſuch Copyhold or Cuſtomary *Tenure*, is a different Fact, from a *naked* Poſſeſſion, or Occupation of the *Land*.

But, whoever will look into the Practice of *other* Countries, where Tenures ſubſiſt with all the Solemnities of Feoffments and Seiſins, upon every Change of a Tenant by Deſcent or Alienation, and upon every Uſurpation of the Real Right; will eaſily comprehend, that at the time I ſpeak of, it may be as notorious *who was the Feudal Tenant de facto*, as who is now *de facto* Incumbent of a Living, or Mayor of a Corporation.

Disseisin was a complicated Fact, and differed from *Diſpoſſeſſing*. The *Freeholder* by *Diſſeiſin*, differed from a *Poſſeſſor by Wrong*. *Bracton* ‡ *c.* 2. *De Aſſiſa Novæ Diſſeyſinæ*, *fo.* 160. puts many Caſes of Poſſeſſion wrongfully taken, which ‡ V. Lib. 4. c. 1, 2.

he

‡ P. 109. ‡ he calls *Intruſion*; becauſe there is no Diſſeiſin: "Poſſeſſio "quæ nuda eſt omnino, & ſine aliquo *Veſtimento*; quæ dici- "tur Intruſio." *Veſtimento* is Seiſin, Inveſtiture; (from whence the *Saxon* Term Veſt;) a Metaphor, the Feudiſts took from Clothing: By which, they meant to intimate, "that the *naked Poſſeſſion* was *clothed* with *Solemnities of the* "*Feudal Tenure*." A particular Tenant, according to Feudal Notions, was *in* as of the *Seiſin of the Fee*, of which his Eſtate was a Part. If he aliened the Fee, (which he could only do by ſolemn Feoffment, with the Concurrence of the Lord of whom the Fee was held,) He forfeited his particular Eſtate, for having betrayed his *Seiſin* with which he was intruſted: But on account of the *Privity* and *Confidence* between him and the Reverſioner; and the *notorious Solemnity* of the Act of Inveſtiture, *His* Feoffment *diſſeiſed* the Reverſioner.

Bracton who wrote in the Reign of *Hen.* 3. (before Tenants could alien without Licence,) mentions the *Diſſeiſin* in this Caſe, as a *neceſſary Conſequence*, and as a thing which *could not poſſibly be otherwiſe*; *c.* 3. *De Aſſiſa Nova Diſſeyſinæ*, 161. *b.* "Item facit quis Diſſeyſinam *cum Quis in Seyſina fue-* "*rit* ut de libero Tenemento & ad Vitam, vel ad Terminum "Annorum, vel nomine cuſtodiæ, vel aliquo alio modo; "ALIUM *feoffaverit, in Præjudicium veri Domini, & fecerit* "*alteri liberum Tenementum; cum duo ſimul et ſemul, de eodem* "*Tenemento & in ſolidum, eſſe non poſſunt in Seyſina.*" He conſiders it as impoſſible for the true Tenant not to be put out, when the other actually came into his Place.

So late as the 32d of *Eliz.* in the Caſe of *Matheſon* v. *Trot*, 1 *Leon.* 209. The Diſtinction upon which the Judgment turns is "That *Henry Denny* gained a *wrongful Poſſeſſion in Fee*; but did *not* gain any SEISIN; ſo *no Diſſeiſor:* Therefore the "Deſcent to his Heir is not privileged."

No Body can *diſſeiſe* the King; neither can any one be diſſeiſed to the Uſe of the King. The King may be wrongfully *diſpoſſeſſed:* But the Intruder's injurious Poſſeſſion is *ſine aliquo Veſtimento*, and called *Intruſion*. The King cannot be made a Diſſeiſor; not becauſe it is wrong; (For He may, in Fact, with-hold the Poſſeſſion of Land from a Subject contrary to Right:) But the Reaſon ſeems, according to the Feudal Syſtem, to be this: A Subject never could ſtand in the King's *Seiſin* or *Tenure*; and the King never could be in the *Seiſin*, *Tenure*, or *Feudal Relation* of a Subject. By that Policy, all Real Property was held, mediately, or immediately, *of* the King: In the King himſelf, All real Property was *allodial*.

The

† The preciſe Definition of what conſtituted a Diſſeiſin † P. 110.
which made the Diſſeiſor the Tenant to the Demandant's *Præcipe*, though the Right Owner's Entry was not taken away, was *once* well known; But it is not *now* to be found. The more We read, unleſs We are very careful to diſtinguiſh, the more We ſhall be confounded. For, *after* the Aſſize of *Novel Diſſeiſin* was introduced, the Legiſlature, by many Acts of Parliament, and the Courts of Law, by liberal Conſtructions in Furtherance of Juſtice, *extended* this Remedy, for the ſake of the Owner, to *every* Treſpaſs or Injury done to his real Property; if, by bringing his Aſſize, He thought fit to *admit* himſelf diſſeiſed.

It lay againſt Adviſers, Aiders, or Abettors, who were not Tenants. *Co. Lit.* 180. *b.* It lay againſt the Tenant who was no Diſſeiſor; as the Heir of a Diſeiſor, or his Feoffee. *Stat. Glouceſter.* It lay for the Owner, againſt the Diſſeiſor of the Diſſeiſor. The Tenant's not being ready to pay a Rent Seck when demanded, was, for the Benefit of the Owner's Remedy, a Diſſeiſin. *Lit.* §. 233. It lay for outrageous Diſtreſs. 2 *Inſt.* 412. It lay againſt Guardian, or particular Tenant who made a Feoffment, as well as againſt their Feoffees. 2 *Inſt.* 413. The Stat. of *Weſtm.* 2. *c.* 25. extends it to a Man's Depaſturing the Grounds of another; or taking Fiſh in his Fiſhery. If One receives my Rent without my Conſent, I may elect to make him a Diſſeiſor. *Style* 407. If a Guardian aſſigns Dower to a Woman not Dowable; the Owner may elect to make her a Diſſeiſoreſs. 24 *Ed.* 3. 43. (cited in *Cro. Car.* 203.) In a Word; For the ſake of the Remedy, as between the true Owner and the Wrong-doer, to puniſh the Wrong; And, as between the true Owner and naked Poſſeſſor, to try the Title; The Aſſize was *extended* to almoſt every Caſe of Obſtruction to an Owner's full Enjoyment of Lands Tenements or Hereditaments.

The Reports of Aſſize can only relate to Caſes, where the Owner *admits* himſelf diſſeiſed.

The Law-Books treat of Diſſeiſin, with a View to the *Aſſize*; which was the common Method of trying Titles, till the Ejectment came in Uſe.

Littleton, who wrote long after the Remedy by Aſſize was enlarged by Statutes and by an equitable Latitude of Conſtruction, ſpeaks of Diſſeiſins principally as between the Owner and Treſpaſſer or Poſſeſſor, with an Eye to the Remeby by *Aſſize*.

Theſe are the common Places from whence many Deſcriptions have been cited of a DISSEISIN. But ſuch Authori-

† P. 111. † ties can give little Light to the *preſent* Queſtion, which depends upon the Nature of *ſuch* a Diſſeiſin as made the Diſſeiſor Tenant to every Demandant, and Freeholder *de facto*, IN SPITE *of the true Owner*. Yet the Definitions in the Books, (though very imperfect,) favour often of that which originally was an actual Diſſeiſin, *in ſpite* of the Owner.

Littleton, in § 279. defines Diſſeiſin, with an *&c:* "Where "a Man enters into Lands or Tenements (where his Entry is "not congeable,) and ouſteth him which hath the Freehold, "*&c.*"—The Comment ſays, "*Every* Entry is no Diſſeiſin, "unleſs there be an *Ouſter of the Freehold.*" And *Co. Lit.* 153. *b.* ſays, "*Diſſeiſin* is putting a Man out of *Seiſin*, and ever "implies a Wrong: But *Diſpoſſeſſion* or *Ejectment*, is putting "out of *Poſſeſſion*, and may be by Right *or* Wrong. *Diſſeiſin* "*eſt un perſonal Treſpaſs de tortious* Ouſter del Seiſin."

Though the *Term* "DISSEISIN," uſed, happens to be the ſame; the *Thing ſignified* by that Word, as applied to the two Caſes of *actual* Diſſeiſin, or Diſſeiſin *by Election*, is very different. This Diſtinction of Diſſeiſin *at Election*, is made in the Caſe of *Blunden* v. *Baugh*, *Cro. Car.* 303. of which Caſe, We have ſeen a Manuſcript Report, fuller than the Printed One. The three Judges, with whom agreed the four Judges of the Common Pleas, argued and held "That the Leſſee for Years "of the Tenant at Will, was a Diſſeiſor at the *Election* of the "Original Leſſor, for the ſake of his Remedy; but never could "be looked upon as the Freeholder, or a Diſſeiſor *in ſpite* of "the Owner, or with regard to *third* Perſons." The Manuſcript Report ſays, if a *Præcipe* was brought againſt him, he might ſay "I am not Tenant to the Freehold." A Variety of like Caſes are put in *Cro. Car.*; (to which I refer—:) In the Manuſcript Report, there are more.

When the eaſy ſpecific Remedy was by *Aſſize*, where the Entry was not taken away, the injured Owner might, for his Benefit, elect to conſider the Wrong as a *Diſſeiſin*. So, ſince an *Ejectment* is become the eaſy ſpecific Remedy, He may elect to call the Wrong a *Diſpoſition*.

Where an *Ejectment* is brought, there can be *no Diſſeiſin*; becauſe the Plaintiff may lay his Demiſe when his Title accrued, and recover the *Profits* from the *Time* of the Demiſe. The Entry confeſſed is previous to making the Leaſe: But there is *no* real or ſuppoſed *Re-entry*, after the Ejectment complained of. If it was conſidered as a Diſſeiſin, No *meſne Profits* could be recovered without an *actual* Re-Entry.

If

† If the Leſſee for Life, or Years, makes a Feoffment, the Leſſor may ſtill diſtrain for the Rent; or charge the Perſon to whom it is paid, as a Receivet; or bring an Ejectment; and *chooſe* whether he will be conſidered *as diſſeiſed*. *Metcalf on the Demiſe of Kynaſton* v. *Parry and others*; A Caſe reſerved at *Salop* Aſſizes 25th *March* 1742, for the Opinion of the Court of Exchequer; (who gave Judgment in it, on the 24th of *November* 1743,) was this. Tenant in Tail, of Lands leaſed by his Father, to a Second Son, for Lives, (under a Power,) upon his Father's Death received the Rent from the Occupier, as Owner, and as if no ſuch Leaſe had been made during his whole Life. He ſuffered a Common Recovery. It was holden "That this was only a Diſſeiſin of the Freehold *at Election*; "and that therefore He could *not* make a good Tenant to the "*Præcipe*:" And the Recovery was adjudged *bad*. † P. 112.

Except the Special Caſe of Fines with Proclamations, (which ſtands entirely upon diſtinct Grounds,) and the Conſtruction of the Stat. of 4 *H.* 7. *c.* 24. for the ſake of the Bar; I cannot think of a Caſe, where the true Owner, whoſe Entry is not taken away, *may not* elect, (by purſuing a poſſeſſory Remedy,) to be deemed as *not* having been *diſſeiſed*.

The Conſequences of *actual Diſſeiſins*, conſidered *as ſuch*, continue Law to this Day. The Diſſeiſee cannot diſpoſe, or deviſe: The Deſcent takes away his Entry. There are two Caſes cited in the Caſe of *Blunden* v. *Baugh*, material to this Point. *Pouſly* v. *Blackman*, *B. R. Trin.* 18 *Jac. Rot.* 1230. *Palmer* 201. which is more fully ſtated in the Manuſcript Report, than in * *Croke*. The Caſe (in Effect and Operation) was this, Tenant at Will made a Leaſe for Years: The Original Leſſor deviſed. Though the Leaſe by Tenant at Will, at the *Election* of the Original Leſſor was a *Diſſeiſin*, Yet they adjudged his Deviſe good; becauſe he had *not elected* to *admit* himſelf diſſeiſed; and, by making a Will, intimated the *Contrary*. * V. Cro. Jac. 659. S. C.

Another Caſe, (not in the Report in *Cro. Jac.* but cited in the Manuſcript,) was in the 14th of *Eliz.* Sir *Ambroſe Cone*, of his own head, entered into Lands of Sir *William Hollis*; and paid Sir *William*, afterwards, a certain Rent, claiming to hold as Tenant at Will; and died. His Heir entered: Upon whom, Sir *William* entered. It was adjudged "That at the "*Election* of Sir *William*, Sir *Ambroſe* was a Diſſeiſor: But as "Sir *William* had not determined his Election before the Death "of Sir *Ambroſe*, and entered upon his Heir, it was *no Diſſei-* "*ſin*; and conſequently, the Deſcent no Bar to his Entry."

§ P. 113. § In the Case of *Pously* v. *Blackman*, *Palmer* 205. It is said, "If a Disseisee devise, and afterwards enter; the Devise is "good:" Which *Dodderidge* denied, and said there must be a new Publication. Which seems right, *if* there ever *was* a Disseisin: For, where an *actual Entry* is necessary, it will not make good a Conveyance made *before*; as was holden in *B. R.* †May 1738. & *Dom. proc.* in the Case of † *Berrington* v. *Parkhurst*. The *actual Entry could not support* the Lease made *before*. Yet in ‡ 1 Salk. 237. Bunter v. Coke. ‡ *Salk.* 237. It is agreed, "the Devise is good, because he "was *seised ab initio*, so as he might bring Trespass:" *i. e.* He *never* was *disseised* at all, *by his Election*; and he might make *that Election*, without an Entry; He might bring his Ejectment, he might bring Trespass, *without* a Re-Entry. If it was not for this Doctrine of *Election*, what a Condition would Men be in!

In the Case of *Pously* v. *Blackman*, there was *no Entry*: And after much Argument, it was at last resolved unanimously by the whole Court, from the Inconveniences which would be introduced if a Lessee by a secret Contract with a Stranger could defeat the Will of his Lessor, "*That the Devise was good.*" And in the Manuscript Report where it is cited, One Point said to have been resolved is "That the Owner, *by making a Devise*, shewed his ELECTION, NOT *to be disseised.*"

I will now consider Whether *James Earle* can be deemed a good *Tenant of the Freehold by Disseisin.*

DISSEISIN is a *Fact*. It is *not found*: All the Jury say, is "That soon after the Judgment in Ejectment, Sir *Robert entered* "*and was in Possession.*" This must be taken to be an Entry *in consequence of the Judgement*—It was so considered upon settling the Special Verdict: Otherwise the Defendants have no Case; For it is not found, That Lady *Atkyns* was ever ousted, or quitted the Possession, or that Sir *Robert* ever was seised.

Taking Possession, *under a Judgment in Ejectment*, never could be a *Disseisin of the Freehold.*

Suppose it a *real* Proceeding—The Termor of a Disseisee might, at the old Law, recover against the Disseisor: He might recover against the Feoffee of his Lessor. But he never could thereby become a *Disseisor of the Freehold*: He never could be other than a Termor, enjoying, in the Nature of a Bailiff, by Virtue of a real Covenant. In respect of the Freehold, his Possession enured always by *Right*, and never by *Wrong*. If the Lessor had infeoffed, it enured to the *Alienee*; If the Lessor was disseised and might

‡ might enter, It enured to the *Diſſeiſee*; if his Entry was taken away, it enured to the *Heir or Feoffee or the Diſſeiſor*, who in *that* Caſe had the Right of Poſſeſſion. ‡ P. 114.

Suppoſe the Proceeding (as it is) a *fictitious* Remedy. Then in Truth and Subſtance, a Judgment in Ejectment is a Recovery of the *Poſſeſſion*, (not of the *Seiſin* or *Freehold*,) without Prejudice to the *Right*, as it may afterwards appear, even between the Parties. He who enters under it, in Truth and Subſtance can only be *poſſeſſed according to Right, prout Lex poſtulat.*

If He has a Freehold, He is in as Freeholder. If he has a Chattel-Intereſt, He is in as a Termor; and in reſpect of the Freehold, his Poſſeſſion enures *according to Right*. If he has no Title, He is *in* as a Treſpaſſer; and without any Re-Entry by the true Owner, is liable to account for the Profits.

It is found, That the Ejectment was brought by Sir *Robert Atkyns*, to recover the *Poſſeſſion:* But it is not found, that he claimed the *Freehold.*

The Title muſt *now* be taken as in *this Special Verdict*, Therefore it appears he had *no Right* to the *Poſſeſſion*. His *Feoffee* could be in no other Condition than *himſelf:* He had a Poſſeſſion without Prejudice to the *Right*; and could convey *no other*. He was not *in* as a particular Tenant;—There was no Privity of any Seiſin;—He had only a *naked* Poſſeſſion.

But the Caſe is ſtill ſtronger. The true Owner cannot even elect to make a Perſon in Poſſeſſion *under a Judgment in Ejectment*, a DISSEISOR. He could not bring an Aſſize of *Novel Diſſeiſin:* The Entry is *not injuſtè & ſine Judicio*; but *under* Authority of a Court of Juſtice, and *lawful*; therefore not liable to puniſhment by Fine, (as every Diſſeiſin was.)

The true Owner may enter upon a Diſſeiſor: But after a Judgment in Ejectment, an actual Entry would be permitted. If there *had* been any Election in this Caſe; the true owner elected "*not to be diſſeiſed*," and recovered by Ejectment: Which, if there had been a Diſſeiſin, would have purged it.

But there is ſtill behind, (though it happens not to be neceſſary,) a *larger Ground*, upon which to determine this Queſtion; and more ſatisfactory, becauſe more intelligible; from the *Nature of a Common Recovery now*, and a Feoffment to make a Tenant to the *Præcipe*, with *that* View *only.*

The

§ P. 115. § The Senſe of wiſe Men, and the general Bent of the People in this Country, have ever been againſt making Land perpetually unalienable. The Utility of the *End* was thought to juſtify any *Means* to attain it.

Nothing could be more agreeable to the *Law of Tenures*, than a Male Fee unalienable. But this Bent "to ſet Property free," allowed the Donee, *after* a Son was born, to deſtroy the Limitation, and break the Condition of his Inveſtiture.

No ſooner had the *Statute de Donis* repeated what the Law of Tenures ſaid before, "That the Tenor of the Grant ſhould "be obſerved;" than the ſame Bent permitted Tenant in Tail of the Freehold and Inheritance, to make an Alienation, *voidable* only, under the Name of a *Diſcontinuance*. But *this* was a ſmall Relief.

At laſt, the People having groaned for 200 Years under the Inconveniences of ſo much Property being unalienable; and the Great Men to raiſe the Pride of their Families, and (in thoſe turbulent Times) to preſerve their Eſtates from Forfeitures, preventing any Alteration by the *Legiſlature*;—The ſame Bent threw out a * *Fiction*, in *Taltarum*'s Caſe; by which, Tenant in Tail of the Freehold and Inheritance, or with Conſent of the Freeholder, might alien abſolutely.

* Pigott, of Common Recoveries, pa. 7, 8, 9, 10.

Public Utility adopted and gave a Sanction to the Doctrine; for the *real* political Reaſon, "to break Entails:" But the *oſtenſible* Reaſon, "from the fictitious *Recompence*," hampered ſucceeding Times, how to diſtinguiſh Caſes which were within the falſe reaſon given, but not within the real Policy of the Invention. 'Till, at laſt, the *Legiſlature* applauded Common Recoveries, and *lent their Aid* by the Acts of 11 *H.* 7. *c.* 20. 33 *H.* 8. *c.* 31. 34 & 35 *H.* 8. *c.* 20. 14 *Eliz. c.* 8. and lately 14 *G.* 2. *c.* 20: (Which is a retroſpective and declaratory Law, and ſeems to have reſtored the Original Tenant to the *Præcipe*.) Before the Statute of *Quia Emptores terrarum*, *Subinfeudations* whereupon Rents and Services were reſerved, did not prevent the *Præcipe*'s lying againſt the Freeholder of the Seignory. When common Leaſes to Farmers, for One or more Life or Lives, reſerving Rent, came in Uſe; They, for that Purpoſe, *reſembled Subinfeudations*, and ought not to prevent the *Præcipe* being brought againſt the Owner of the Freehold, under which ſuch Leaſes were granted.

As the *Legiſlature* has, for Ages, *avowed* the Propoſition; We may *now* ſay "that Common Recoveries are a mere

"*Form*

§ "*Form of Conveyance.*" All neceſſary Circumſtances of Form and Ceremony are taken from its fictitious Original. § P. 116.

The Policy of *this Species* of Alienation meant to take a *middle* Way as to Entails, between Perpetuities and abſolute Property.

Alienations were *allowed*; yet in ſuch a Shape as neceſſarily required *Deliberation* and *Delay*: And they were only allowed to be made by Tenant in Tail in *Poſſeſſion*; or by Tenant in Tail in Remainder, *with Conſent* of the Owner of the firſt Eſtate for Life. The Eldeſt Son was reſtrained in the Life-time of his Father, or Mother, or any other Anceſtor or Relation, ſeized for Life, under a Family Settlement.

The Act of 14 *G.* 2. proceeds, upon the Parties to a Recovery having *Power to ſuffer it*. Sir *Robert Atkyns* the Son had *no* Right to ſuffer a Common Recovery, without the *Concurrence* of the Jointreſs. Any Contrivance to do it *without* her Joining, is Artifice and Evaſion.

If Tenant in Tail in Poſſeſſion is diſſeiſed; though the *Præcipe* be brought againſt the Diſſeiſor, yet, if *he* is vouched, the Recovery ſhall bar; Becauſe *he* had *Power to Bar*.

In *Lincoln* College Caſe, 3 *Co.* 59. The Judges ſupport the Collateral Warranty of *Sibil*; *becauſe* She and *Edward* had *Power to bar*.

In *Jenning*'s Caſe, 10 *Co.* 44. The Recovery is ſupported, *becauſe* the Parties had *Power*.

By Parity of Reaſon, *this* Recovery ought *not* to be ſupported, *becauſe* the Parties had NO Power: If it was; the Law muſt be overturned.

Every Remainder-Man in Tail might eaſily get a *naked* Poſſeſſion, and make a *ſecret Feoffment*.

The Plan of Marriage and other Family Settlements, is "to "limit a Remainder to the firſt, and every other Son in Tail." The *Negative* which the Father now has upon the eldeſt Son's ſuffering a Common Recovery, is the very *Means* and *Conſideration* of getting the Eſtate re-ſettled, upon the Marriage of the Eldeſt Son. By *this* Method, the Moment he attains to the Age of 21 Years, He may ſet his Father at Defiance, ſuffer a Common Recovery, and bar all the reſt of the Family. *This Conſequence alone*, in a Caſe *unprecedented*, is a ſufficient Objection.

§ P. 117. § When a Termor, after the 4th of *H.* 7th, made a Feoffment, and levied a Fine with Proclamations, and inſiſted upon 5 Years Non-Claim, the Judges, with ſtrong Senſe, ſaid, though a Feoffment by Tenant for Life, or Years, or at Will, is a Diſſeiſin; It ſhall *not* operate as a Diſſeiſin, to enable the *Termor Himſelf* to bar the Inheritance, by a Fine with Proclamations according to the 4 *H.* 7. *c.* 20. For, ſay they, "It was never the Intent of the Makers of the Act, that thoſe who "could not levy a Fine, ſhould by making an Eſtate *by Wrong* "*and Fraud*, be enabled to bar thoſe who had Right. For if "they themſelves, *without ſuch fraudulent Eſtate* could not levy "a Fine to bar them who had the freehold and Inheritance; "Certainly the Makers of the 4th of *H.* 7. *c.* 20. did not intend "that by making of an Eſtate *by Fraud and Practice*, they ſhould "have Power to bar them: And ſuch *fraudulent* Eſtate is as "*no* Eſtate, in the Judgment of the Law." So ſay I, in the preſent Caſe. It was never the Intent, that thoſe *who could not ſuffer a Recovery*, ſhould, by making an Eſtate *by Wrong and Fraud*, be enabled to bar thoſe in Remainder or Reverſion who had a Right. For if they themſelves, *without ſuch fraudulent Eſtate*, could not ſuffer a Recovery to bar thoſe in Remainder and Reverſion; Certainly, the Framers of this qualified Species of Alienation, did not intend, that by making an Eſtate *by Fraud and Practice*, the ſhould have Power to bar them: And ſuch *fraudulent* Eſtate is as *no* Eſtate, in the Judgment of the Law.

The Judges then put many Caſes, where a recovery in Dower, or other real Action; a Remitter to a Feme Covert, or an Infant; a Warranty; a Sale in Market Overt; the King's Letters Patent; a Preſentation; an Adminiſtration;—In ſhort, all Acts Temporal and Eccleſiaſtical, ſhall be *avoided by Covin:* And from thence argue that a Fine which the Parties had *no Power to levy directly*, ſhall not be ſupported *indirectly* by Covin. So argue I, in the preſent Caſe: A Common Recovery which the Parties had *no Power* to ſuffer *directly*, ſhall *not* be made good *by Wrong and Fraud.*

In the Spirit of the Makers of the 14 *G.* 2. I ſay the Parties to this Recovery had *not* Power to ſuffer it: *Therefore* it is *ſubſtantially bad.*

This is *not* the Caſe of a Feoffment to a *third* Perſon, for *his own* Benefit: It is, in Effect, to the Uſe of Sir *Robert* the *Wrong-Doer*, *himſelf.* The Law conſiders a *Feoffee to the Intent to be Tenant to the Præcipe*, as a *mere Inſtrument* for *one* Purpoſe of *form only.* His Wife ſhall *not* be endowed; His Statutes or Judgments ſhall *not* affect the Land; If he had a Term for Years, it ſhall *not* merge. Let me appeal

peal then to the oldeſt Authorities, in thoſe Times where § the Solemnity and Notoriety of Feoffments, and the Feudal § P. 118.
Veneration in which they were held, gave them all that wonderful Efficacy We read of: Could a Man, by *his own injurious* Feoffment, have acquired an Advantage to himſelf? *Littleton* ſhall anſwer: He tells us what was eſtabliſhed long before he wrote. *Lit.* § 395. "If a Diſſeiſor infeoff his Father "in Fee, and the Father die ſeized of ſuch Eſtate, by which "the Lands deſcend to the Diſſeiſor as Son and Heir, *&c*; In "this Caſe, the Diſſeiſee may well enter upon the Diſſeiſor, "notwithſtanding the Deſcent: For that as to the Diſſeiſin, "the Diſſeiſor ſhall be adjudged in *but as a Diſſeiſor*, notwith-"ſtanding the Deſcent; *Quia Particeps Criminis.*"

After the Statute *De Donis*, Tenant in Tail in Remainder, with the *Concurrence* of the Freeholder, might make a *voidable* Alienation, by *Diſcontinuance:* But he could not acquire to himſelf that Privilege, by an *injurious* Entry and Feoffment. "He "in Remainder in Tail diſſeiſes Tenant for Life, and makes a "Feoffment, and dies without Iſſue, and the Tenant for Life "dies; He in Reverſion may enter: It is no Diſcontinuance." *Co. Lit.* 347 *a. b.* It is no Diſſeiſin of the Reverſion. "If "Remainder-Man for Life diſſeiſe the immediate Tenant for "Life; after the Death of the immediate Tenant, he is in as "Tenant for Life." Neither ſhould a Reverſioner, by an injurious Entry upon the Tenant for Life, be, in reſpect of Strangers, allowed to tranſmit to his Heir the Privilege of Deſcent. If the Reverſioner diſſeiſes Tenant for Life, and dies ſeiſed; the Deſcent ſhall not take away the Entry of a Stranger. *Hob.* 323.

From the Whole, We may conclude—*If, before* the Introduction of Common Recoveries as a Conveyance, this Queſtion had been agitated in an *Adverſary* Real Action, upon a Plea "that *Earle* was not Tenant of the Freehold;" It would have been adjudged, from the Law and artificial Learning of Tenures, "that He could *not* be ſo conſidered." *If* the Queſtion had been, "Whether Tenant in Tail in Remainder ſhould, by "ſuch *injurious* Entry and Feoffment, acquire a *Benefit to him-"ſelf*, to the *Prejudice of the Reverſioner*;" It would have been adjudged, from eternal Principles of Juſtice, "that an "Act founded in Wrong ſhould *not*, by *Virtue of the Crime "itſelf*, became legal, for the *Author's Advantage.*"

And it is *now* agitated, when Common Recoveries are eſtabliſhed, as a *Species of Alieration*;—The only Queſtion is, "Whether the *Rule* of Law which *requires the Concurrence* "of the Owner of the firſt Eſtate for Life, ſhall be *over-"turned.*" 'Tis better to ſubvert the Rule directly, than ſuffer it to be done by a *ſecret injurious* Entry and Feoffment; which

which cannot be prevented, and which the Owner may never hear of.

§ P. 119. § There is no Injury or Wrong, for which the Law does not provide a Remedy. But if this Stratagem ſhould prevail, Redreſs muſt follow *too late*; unleſs the Entry of the Tenant for Life ſhall *avoid* the Recovery. If it would, there is an End of the preſent Queſtion: For the Jointreſs entered, and was intitled to the Profits from Sir *Robert Atkyns* as a Treſpaſſer *ab initio*.

In *every* Light, and upon *every* Ground of Law, this Recovery is *bad*.

As there is no Bar to the RIGHT of the Leſſor of the Plaintiff—

Second General Queſtion. The ſecond General Queſtion is "Whether the Leſſor of "the Plaintiff is, by the *Statute of Limitations*, barred from re- "covering in THIS *Ejectment*."

This Point was certainly not inſiſted upon at the Trial: And therefore the Special Verdict is not adapted to it. The abſtruſe Learning, upon which the Validity of the Common Recovery depended, might engroſs the whole Attention at the Trial: And the Special Verdict having no Facts, (which eaſily might have been found,) particularly applicable to an Objection from the Statute of Limitations, might occaſion the Queſtion not having been made at the Bar, till the laſt Argument. The Point however is certainly *open*, upon this Special Verdict.

An Ejectment is a *poſſeſſory* Remedy, and only competent where the Leſſor of the Plaintiff *may enter*: Therefore it is always neceſſary for the Plaintiff to ſhew, that his Leſſor had a *Right to enter*; by *proving* a Poſſeſſion within 20 Years, or *accounting for the want* of it, under ſome of the Exceptions allowed by the Statute. *Twenty Years* adverſe Poſſeſſion is a *poſitive Title* to the Defendant: It is not a Bar to the *Action* or *Remedy* of the Plaintiff, only; but takes away his *Right of Poſſeſſion*.

Every Plaintiff in Ejectment muſt ſhew a *Right of Poſſeſſion*, as well as of *Property*: And therefore the Defendant needs not *plead* the Statute, as in the Caſe of Actions.

The Queſtion then is, Whether it appears upon this Special Verdict, "that the Leſſor of the Plaintiff *might* ENTER, when "he brought this Ejectment."

On the 9th of *November* 1711, Sir *Robert Atkyns* died without Iſſue Male.

On

§ On the 19th of *October* 1712, Lady *Atkyns*, the Jointreſs, died. *Then* accrued the *Title of Entry* of the Leſſor of the Plaintiff. His only *Excuſe for not entering* is, "That He was "*prevented* by the ſaid LEASE of the 31ſt of *May* 1698, *to the* "*three Dacres.*"—That upon the Death of *Thomas Dacres* the Surviving Leſſee, on the 23d of *July* 1752, a *new Title of Entry accrued: Upon which*, He entered on the 15th of *December* 1752; and brought this Ejectment. § P. 120.

Three Anſwers are given: Any one of which, if well founded, is ſufficient.

1ſt. That the ſaid Leaſe was abſolutely *void*, and of no Effect.

2d. If good, It *determined* by the Eſtate Tail being ſpent; by the expreſs Tenor of the Deviſe.

3d. If ſubſiſting, yet, upon the Extinction of the Eſtate Tail, It was a *Truſt to attend the Inheritance* in the Leſſor of the Plaintiff, and made *part of his Title Deeds:* Therefore could not ſtop the Statute's running, to protect an adverſe Poſſeſſion, nor give Him any new Right of Entry.

Firſt. That the *Leaſe* was *void.*

Sir *Robert Atkyns* the Father, being only Tenant for *Life*, could, by Virtue of his *Ownerſhip*, make no Eſtate to continue after his Death. This Leaſe therefore, after his Death, can only be ſupported by his *Power*; if it was made purſuant to it. 1ſt Anſwer to the Excuſe for not entering.

"Whether it *was* made purſuant to his Power," is the Queſtion.

The Limitation and modifying of Eſtates, by Virtue of Powers, came from Equity into the Common Law, with the Statute of Uſes. The *Intent* of Parties who gave the Power, ought to govern every Conſtruction. He to whom it is given, has a Right to enjoy the full Exerciſe of it: They over whoſe Eſtates it is given, have a Right to ſay "It ſhall not be exceeded." The Conditions ſhall not be evaded; It ſhall be *ſtrictly purſued*, in Form and Subſtance: And all Acts done under a Special Authority, *not* agreeable thereto, nor warranted thereby, muſt be *void.*

Of all kinds of Powers, the moſt frequent is that "to *make* "*Leaſes.*" For the Encouragement of Farmers, to occupy, ſtock, and improve the Land, It is neceſſary they ſhould have ſome *permanent* Intereſt. *Unleſs* the Owner of the Eſtate for Life was enabled to make a *permanent* Leaſe, He could not enjoy to the beſt Advantage, during his *own* Time:

‡ P. 121. ‡ Time: And they who come *after*, muſt ſuffer, by the Land being un-tenanted, out of Repair, and in a bad Condition. The Plan of this Power is for the *mutual* Advantage of Poſſeſſor and Succeſſor. The Execution thereof is checked with many Conditions, to guard the Succeſſor; that the Annual Revenue ſhall not be diminiſhed; nor Thoſe in Succeſſion or Remainder, at all prejudiced in Point of Remedy, or other Circumſtances of full and ample Enjoyment.

There are *two* Methods of Leaſing in common Uſe in this Kingdom: At the beſt Rent; and upon Fines; which, as the Lives or Leaſes drop, are conſidered among the annual Profits. This Power is always adapted to *both*. It is inſerted in almoſt every ſtrict Settlement of every Kind. It is inſerted in the Greater Deed of the 12th of *June* 1669; and given indiſcriminately to Sir *Robert* the Father, Sir *Robert* the Son, and *Lovis* his Wife.

The Nature and View of a Power, ſo uſually given, is well underſtood: And Courts of Juſtice have always looked with a jealous Eye, to ſee that the Conditions in Favour of the next Taker be *purſued*; not literally only, but *ſubſtantially*. It is not ſufficient that the antient Rent be reſerved: It muſt be reſerved with all the *Beneficial Circumſtances*. If payable before, at four, It cannot be reſerved at two Payments. Lord *Mountjoy*'s Caſe, 5 *Co.* 3. *b*. The whole Rent muſt be payable annually during the whole Term. In that Caſe, It was holden "that "leſs could not be reſerved, even to the Leſſor himſelf, during "his own Life."

One of the Reaſons in *Elmer*'s Caſe, 5 *Co.* 2. ſhews the Rent muſt be payable annually during the Term.

In the Caſe of *Lady Charlotte Orby & al'* v. *Lady Mohun*, 2 *Vernon* 531, 542, Lord *Cowper*, *Holt*, and *Trevor*, All three held clearly, that a Leaſe "reſerving the *beſt Rent*," though good againſt an Owner of the Inheritance, was *void under a Power*: And *Cowper* and *Trevor* held, That reſerving "the "*Ancient Rent*," where Lands had been uſually demiſed; though good and certain enough by Reference, againſt an Owner of the Inheritance, was void *under a Power*; Becauſe it put the Remainder-Man *under Difficulties* in avowing.

"The Intent was," ſay they, "that the Tenant for Life in "Poſſeſſion might leaſe: So it was, on the other hand, that "the Revenue ſhould not be diminiſhed; but the ancient Rent, "at leaſt, reſerved; and in *ſuch beneficial Manner*, as might "with Certainty, and without any Difficulty be recovered."

"The

‡ " The Queſtion here is not, ſay they, " Whether the ‡ P. 122.
" Leaſe is void for Incertainty, as between the Leſſor and Leſ-
" ſee; but where *All Requiſites* are obſerved, and *ſuch beneficial*
" *Cauſes and Reſervations* as ought to have been, for the *Benefit*
" *of a third* Perſon, the Remainder-Man."

In the Caſe of the *Earl of Cardigan* v. *Montague*, 6th *June* 1755, A Decretal Order on the Maſter's Report; the Duke of *Montague*, Tenant for Life, without Impeachment of Waſte, had Power to leaſe, reſerving ancient Rent where uſually demiſed, and beſt Rent where not uſually demiſed: He made 24 Leaſes. The Maſter's Report, as to many of the Leaſes, which he reported Bad, was ſubmitted to: As where ancient Covenants " to " grind at Mills, or to pay Land Tax," were not in the new Leaſe;—Where ſome Part not within the Power, is included in the Leaſe;—Where many Manors were included in the Leaſe, reſerving a Sum certain, as the beſt Rent; which laid the Remainder-Man under Difficulties, to find out whether it was the beſt Rent or not. As to Five of them which the Maſter reported to be good, Exceptions were taken. Their Validity turned upon this Caſe. The Words in the Power were " Reſerving " ancient, uſual, and accuſtomed Rents, Herriots, *Boons*, and " Services." In the former Leaſes, the Tenants covenanted " to keep in repair:" That Covenant was *omitted* in this. The Lord Chancellor was of Opinion, that that Covenant was a *Boon*, and *beneficial to the Remainder-Man*; and held theſe Leaſes *void, for want of it*. He took ſome Days to conſider; and declared he was clear upon the Argument, but took time, becauſe there was no Caſe in Point. The more he thought of it, the more he was convinced. The Principle he reſted upon was, that the Eſtate muſt come to the Remainder-Man, in *as beneficial* a Manner, as ancient Owners held it.

I have gone ſo far at large into the General Doctrine, not from any Difficulty; but becauſe the Point is of ſo much Conſequence to the Leſſor of the Plaintiff. For this Writing of the 31ſt of *May* 1698, has not Colour enough to make a Queſtion.

1ſt. It is *no Leaſe* at all. The very Definition of a Leaſe, is a Contract between Landlord and Tenant, by which both are bound in *mutual* Stipulations.

A Sale and Leaſe are defined to be the ſame Species of Contract. A Sale cannot be, unleſs ſome-body agrees to pay the Price: Nor can there be a Leaſe, unleſs ſome-body agrees to hire, and to pay the Rent. This Writing *purports* to be ſuch a Contract. It is an *Indenture*: which implies reciprocal

‡ P. 123. ‡ reciprocal Inſtruments, tallying One with the Other. It *profeſſes* being made by Sir *Robert Atkyns* on the One Part, and the three *Dacres* on the other Part. But *it is not:* The *Dacres* are *not bound*; they *never executed this*, or any Counterpart. It does not appear they *knew* or *conſented* to the Making of it.

Livery of Seiſin was *immaterial.* A Leaſe by Virtue of a *Power*, takes Effect *out of the Settlement* that gives the Power. But *John Dacres*, who gave the Letter of Attorney to take Livery, died in 1705. *Robert* died in 1706. Sir *Robert Atkyns* the Father, lived till 1709. Suppoſe, at his Death, 360*l.* a Year a beneficial Rent: Thoſe in Remainder *could not demand it. Thomas Dacres* had *not executed* the Leaſe; He had *not accepted* it; He *never had entered* under it: *No Diſtreſs* could be taken from him; *No Action* could be brought againſt him.

One Man cannot oblige another to be his Tenant, at a high Rent, *without his Conſent.* This is ſo plain, that on the Part of the Plaintiff, they have argued that *Thomas Dacres* was bound by Acceptance; 3 Ways—

1ſt. Becauſe Livery of Seiſin was taken in the *Name* of *John, Robert, and Thomas.*

Anſwer. THOMAS *gave no Authority ſo to do:* It does not appear that he knew of it. But the *mere* Taking Livery of Seiſin, if he *never entered or occupied*, would *not* be ſufficient to *charge* him with the Rent reſerved.

2d. In the Ejectment brought in *Hilary* Term 1711, a *Demiſe* was laid *from Thomas Dacres*, as well as the Jointreſs: And the Plaintiff had Judgment to recover "*Separates Terminos.*"

Anſwer. The two Titles are *inconſiſtent:* So there *could not* be really a Recovery upon *both.* But the Judgment purſued the Declaration; and was *mere Form.* It does not appear that *Thomas Dacres knew* his Name was made Uſe of: And He *never entered*, or *took Poſſeſſion.*

3d. That Acceptance ſhall be *preſumed.* And it is compared to Grants: and *Thompſon* v. *Leach* is cited. [*V.* 3 *Lev.* 284.]

Anſwer. The Ground of *Thompſon* v. *Leach*, and of all the Caſes there put, is, "That *a Gift imports a Benefit:* "*and Conſent to receive a* BOUNTY *may fairly be preſumed*, "*till the contrary appear.*" But the Offer of Lands to a ſubſtantial Man at a *Rack* Rent, does not import ſuch a Benefit, as No-body in his Senſes could refuſe. And here, there is *no Room to preſume:* For the *Contrary* appears. *Thomas*

‡ *mas Dacres diſſented*, during his whole Life; and *never took* ‡ P. 124.
Poſſeſſion. The Contrary appears too, from the *Writing itſelf*. It never was the *Intent*, that the *Dacres* ſhould take Poſſeſſion or pay Rent. It was to be a Conveyance only of the *Ideal* Freehold; Which might Non-ſuit the Remainder-Man, in Caſe he brought an Ejectment againſt third Perſons; or prevent his ſuffering a Recovery; but never could be any Security to him for his *Rent*.

It is immaterial, whether an Owner of the Inheritance could convey an Ideal Freehold, to delay the Tenant in Tail, claiming under his Grant, from ſuffering a Recovery.

The Queſtion *here* is, Whether it be that *uſual* Huſbandry Leaſe, reſerving a *Rack* Rent, which is *intended* by every Power of Leaſing.

It is very clear that *None of the Leſſees were bound* by this Writing; more eſpecially, that *Thomas Dacres* was not. But I go further: Sir *Robert Atkyns*, the nominal Leſſor, was *not bound* by it. The *Deed* never was out of his *own Poſſeſſion*. The declared Intent proves it a *Truſt for Sir Robert himſelf*. His Will, under which the Leſſor of the Plaintiff claims, avers it to be a *Truſt*, and deviſes it *as ſuch*.

It is no Objection to a Leaſe under a Power, "That it is *in* "*Truſt for him who executes the Power*:" PROVIDED the *legal Tenant be bound*, during the Term, in all requiſite Covenants and Conditions. But here, at the Death of Sir *Robert* the Father, Thoſe in Remainder had *no Tenant* to reſort to: and the nominal Tenant never did in Fact enter, nor could either in Law or Equity, ever have been *compelled* to *enter*, or pay One Farthing *Rent*. So that this Writing, calling itſelf an Indenture, and purporting to be a Contract, is Waſte Paper only, by which *No-body ever was bound*.

BUT ſuppoſe it had been executed by the 3 *Dacres*; It could not be ſupported as a Leaſe *within the Meaning of the Power*; upon a Variety of plain Objections, in reſpect of the *Premiſſes*, the *Rent*, and the *Remedy*.

1ſt. As to the *Premiſſes demiſed*—It comprizes too much; and lays the Remainder-Man under Difficulties to know whether the beſt Rent is reſerved. It extends to Things out of which no Rents can be reſerved; as Tithes, Rents of Aſſize, Rents of Cuſtomary Tenants, Feedings, and Lands in the ſeveral Tenures of particular Perſons.

The Condition of the Power is, That there ſhould be no Term exceeding 3 Lives in Being at the ſame Time: Yet the Demiſe extends to all and every the Rents reſerved upon *any* Leaſes or Grants.

2dly.

‡ P. 125. ‡ 2dly. As to the *Rent reſerved*—The Power requires " The *beſt* Rent that can be reaſonably got, to be reſerved " *payable during* the Term."

" There is *no Covenant for Payment*. Under a mere Reſervation, it could not be payable *till Entry*: And therefore, in Fact, might *never* be payable, *during* the Term. It is not found " to be the *beſt* Rent."

3dly. As to the *Remedy* There being *no Covenant to pay* the Rent, the Leaſe might be aſſigned to a Succeſſion of Beggars. There being *no Clauſe of Re-Entry*, the Ground might lie unoccupied without any, or not ſufficient Diſtreſs upon it: So that the Remainder-Man could neither have his Rent nor his Land. There is *no Counterpart*; an unuſual Omiſſion, and very prejudicial.

Therefore the Leaſe could *not* have been ſupported, *if it had been executed by the* 3 *Dacres*: Which is *not* the Caſe.

Every fraudulent, unfair, prejudicial Execution of ſuch a Power, in reſpect of *thoſe in Remainder*, is *void* at Law.

If the Leaſe be a void Execution of the Power, againſt ALL *claiming under the Settlement*, It cannot be made good againſt the *Reverſion in Fee*, whereof Sir *Robert Atkyns* the Father was ſeiſed, either by *Virtue* of the Livery, or by way of Eſtoppel, ſuppoſing the 3 *Dacres* to have executed: Becauſe an *Intereſt* would have paſſed during the Life of Sir *Robert Atkyns* the Father; and there is no *Eſtoppel* where any *Intereſt paſſes*; and, to make it operate by *Virtue of the Livery*, *out of the Reverſion in Fee*, would be *contrary to the whole Intent* of the Deed plainly expreſſed. Which brings Me to a ſecond Anſwer given.

2d Anſwer to the Excuſe for not entering.

2d Anſwer. Suppoſe this Pocket undelivered Grant of the Ideal incorporeal Freehold, a good Execution of the Power; They have argued that it DETERMINED *with the Eſtate Tail*; That the *only Cauſe* of the Grant being " to preſerve the Reverſion *during* the Eſtate Tail" muſt *qualify the Grant*, and *amount to a Limitation*; That there is *no technical* Form of Words neceſſary to expreſs a Contingency, upon which an Eſtate for Lives may ſoon determine.

The Deed might have ſaid expreſsly, " If the Heirs Male of " Sir *Robert Atkyns* the Son continue ſo long;" or, " that the " Leaſe ſhould determine, if, during the Lives, the Eſtate Tail " ſhould be ſpent." That the Intent of the Deed, *plainly expreſſed* is *tantamount*.

3d Anſwer.

3d Anſwer, Suppoſe it to ſubſiſt;—It is as a *Truſt*, and deviſed as ſuch, to *attend the Inheritance* of the Leſſor of the Plaintiff; which came into Poſſeſſion the 9th of *October* 1712: His Title and Right of Entry *then* accrued. ‡ P. 126. 3d Anſwer to the Excuſe for not entering.

This Leaſe was One of his Muniments; a mere Weapon in his Hands: And it would be going a great Way, to ſay "ſuch a *Form* ſhould take from an adverſe Poſſeſſion the Be-"nefit of the Statute."

But as we are All clear, "That at the Trial, a *Surren-*"*der* of ſuch a Leaſe might, and ought to be *preſumed*, to "let in the Statute of Limitations;" The Special Verdict, here, *not having found ſuch Surrender*, We cannot come at the Juſtice of the Caſe in *that* Shape.

It is unneceſſary to go into this Point, or the former: And it would be very improper, unneceſſarily to do it.

If the *Dacres* had *no Eſtate* by Virtue of this Demiſe, upon the 9th of *October* 1712, Then this Ejectment was *not* brought *within* 20 *Years* after the Leſſor's Title accrued: And no Facts are found, to excuſe him within any of the Exceptions.

Therefore We are *All* of Opinion that there ſhould be JUDGMENT *for the* DEFENDANTS.

A WRIT OF ERROR was brought in the Houſe of Lords; and came on upon *Thurſday* 26th *January* 1758. The Counſel agreed, and were allowed, to argue the *laſt Point*, for the Judgment of the Houſe, firſt: Becauſe, *if* their Lordſhips ſhould be of the ſame Opinion with the Court of King's Bench, "That *this Ejectment* was *barred* by the Statute of Limitations," It would be quite unneceſſary to go into the *firſt* Queſtion.

All the Judges were ordered to attend. To whom, after the Argument at the Bar was over, the Houſe propoſed the following Queſtion, *viz.*

"Whether Sufficient appears by the Special Verdict in this "Cauſe, to prevent the Leſſor of the Plaintiff, by Force of "the Statute of Limitations, of the 21ſt of King *James* the "Firſt, from Recovering in this Ejectment."

Whereupon, the Lord Chief Juſtice *Willes*, having conferred with the Reſt of the Judges, delivered their unanimous Anſwer, "That Sufficient DOES appear by the Special "Verdict in this Cauſe, to prevent the Leſſor of the Plain-

‡ P. 127. " tiff, by Force of the Statute of Limitations of the 21ſt " of King *James* the Firſt, from Recovering in this Eject- " ment."

Then the Judgment of the Court of King's Bench was AFFIRMED, with 5*l.* Coſts.

Wedneſday 26th Jan. 1757.

Green *verſ.* Mayor of Durham.

Mr. Juſt. Wilmot *abſent (in Chancery.)*

THIS Caſe was ſet down in the Crown-Paper, as a Special Verdict, and was ſo called; and was argued by One Counſel on each Side, in the ſame Manner as if it had been a Special Verdict: But it was only a Verdict upon Six ſeveral Traverſes to the Return of a *Mandamus* (on 9 *Ann. c.* 20.) directed to the Mayor of *Durham*, commanding Him to *ſwear* and admit *Robert Green* into the Place and Office of a Freeman of the *Company* or Fraternity of Free-Maſons, *&c.* of the City of *Durham*.

The Right ſet up by *Robert Green* was his having been duly *Elected* AND ADMITTED a Freeman of the *Company:* But the Objection to his being SWORN *by the Mayor*, was, " That " He had NOT *conformed* to certain *By-Laws* particularly " ſpecified in the Return and found by the Verdict."

The Return was—That *Durham* is and from Time immemorial hath been an Ancient City, *&c.*; and alſo, that a Power is given by a Charter of *Tobias* then Biſhop of *Durham*, (in 44 *Eliz.*) confirmed by King *James* Firſt, to the Mayor Aldermen and COMMON-COUNCIL for the Time being, or the major Part of *them*, (of *whom the* MAYOR AND SIX *of the Aldermen to be* SEVEN,) to make By-Laws, in the *Stead*, *for*, and in the *Name* of the *Whole* Corporate Body of the City of *Durham* and *Framwelgate*.

Then the Return ſet forth, that certain By-Laws were *duly made* by the Mayor Aldermen *and* COMMONALTY, in due Manner met and aſſembled at the Guildhall, *&c.* on 8th *November* 1728. And it particularly ſets forth and ſpecifies three ſeveral By-Laws, as having been then and there *made* BY THEM; to wit—

1ſt By-Law. That for the effectual preventing all Perſons being made free, that have not a Right or Title to their Freedom in the ſaid City, and for the better regulating of the ſame, The Mayor, One or more Alderman or Aldermen of the ſaid City, and the Wardens and Stewards of the ſeveral and reſpective Companies for the Time being, SHALL, *from*

† *from henceforth* MEET at the Guildhall or Toll-booth in the ſaid City, *four Times* in every Year, *viz.* on the firſt *Monday* after *Martin-mas*, the firſt *Monday* after *Candle-mas*, the firſt *Monday* after *May-day*, and the firſt Monday after *Lammas*. And *Every Perſon* that is hereafter to be admitted a Freeman of the *ſaid* CITY *and* BOROUGH of *Framwelgate*, ſhall be THEN AND THERE CALLED, at *Three* of the ſaid ſeveral Meetings, BEFORE *ſuch his Admittance* to be a Freeman; And *to be* APPROVED *of by* the ſaid Mayor and One or more Alderman or Aldermen, and the Wardens and Stewards of the ſeveral and reſpective Company or Fraternity (for the Time being) whereof He or they is or are to be made and admitted a Freeman or Freemen reſpectively or the Majority of the ſaid Mayor Alderman or Aldermen and Wardens of ſuch reſpective Company then and there preſent. † Page 128.

That any *Warden Steward* or *other* Freeman *that ſhall* MAKE any Perſon a *Freeman* of the ſaid *City* or of any *Company therein*, contrary to the ſaid laſt Ordinance or By-Law abovementioned, ſhall reſpectively FORFEIT and pay the Sum of 30*l.* to the Mayor Aldermen and Commonalty of the ſaid City of *Durham*, to be by them recovered by Action, or Diſtreſs of the Offender's Goods, or otherwiſe, and to be paid into the Cheſt or Hutch, for the Uſe of the ſaid Mayor Aldermen and Commonalty, to defray any public Expence that may happen to the ſaid Corporation or Fraternity. 2d By-Law.

That in Caſe the Mayor of the ſaid City for the Time being ſhall ſwear any Perſon that has not actually ſerved Seven Years as an Apprentice with a Freeman of one of the ſaid Companies or Fraternities belonging to or uſed in the ſaid City, or ſhall not be *juſtly intitled* to the ſame by ancient Uſage or Cuſtom within the ſaid City, He ſhall forfeit and pay the ſum of 30*l.*: Which ſaid Sum ſhall be recovered &c. *ut ſupra*, and to be paid *ut ſupra*. 3d By-Law.

All which ſaid ſeveral Ordinances and By-Laws the Return alledges to have, ever ſince the Making thereof, been conſtantly obſerved and kept &c, and to be ſtill in their *full Force and Virtue*, &c.

That *Robert Green* was NOT *elected and admitted a Freeman of the ſaid* COMPANY of Free Maſons, Rough Maſons, Wallers, Paviours, Plaiſterers, Slaters and Bricklayers.

That *Robert Green* was *never duly called* to be a Freeman of *the ſaid City* of *Durham* and *Framwelgate*, *nor* EVER APPROVED *of by the Mayor* and one or more Alderman or Aldermen of the City of *Durham* and *Framwelgate* aforeſaid, and the Warden and Stewards of the ſaid Company or Fraternity

ternity of Free Maſons &c, BEFORE his ſuppoſed Election
† P. 129. and Admiſſion to be a Freeman of the ſaid Company or † Fraternity, according to the firſt Ordinance or By-Law above mentioned, as he ought to have been.

And for *theſe Reaſons* the ſaid Mayor has not ſworn and admitted him, nor adminiſtered the Oaths to him uſually taken for the due Execution of the ſaid Office.

Upon this Return, *Green* takes 6 ſeveral Traverſes: on which Iſſues were tried.

1ſt Iſſue.—That the Mayor Aldermen and Commonalty *did* NOT *duly meet &c*, on 8th *November* 1728, in Order to make By-Laws &c, *Modo & Forma &c*.

2d Iſſue.—That they did not in due Manner *make the firſt* By-Law mentioned in the Return.

3d Iſſue.—That they *did* NOT in due Manner *make the ſecond* By-Law mentioned in the Return.

4th Iſſue.—The *like Denial* of their *making the third* By-Law mentioned in the Return.

5th Iſſue.—That He *was elected and admitted* a Freeman of the ſaid Company or Fraternity of Free Maſons &c, as in the Writ is alledged.

6th Iſſue.—That he was *duly called* to be a Freeman of the ſaid City of *Durham* and *Framwelgate* aforeſaid, and *was approved* of by the Wardens and Stewards of the ſaid Company to be a Freeman of the ſaid City of *Durham* and *Framwelgate*.

The Jury find, As to the 1ſt Iſſue—That upon the 8th of *November* 1728, the then Mayor and Aldermen and Commonalty *did in due Manner meet and aſſemble*, at &c, in order &c, in ſuch Manner and Form as the ſaid Mayor by his Return hath alledged.

As to the 2d Iſſue—That the ſaid Mayor Aldermen *and Commonalty* did then and there, IN DUE MANNER, make the 1ſt By-Law in the Return mentioned, in ſuch Manner and Form as is therein by the ſaid Mayor alledged.

As to the 3d Iſſue—That they did in *due Manner* make the 2d By-Law, in Manner and Form &c.

As to the 4th Iſſue—The like Finding, with regard to the 3d By-Law:

‡ As to the 5th Iſſue—That *Green was* elected and admitted a Freeman of the *Company*, as in and by the Writ is alledged: But that BEFORE SUCH *his Admittance*, He was *not called* at any Meeting held according to the ſaid By-Law in the ſaid 2d Iſſue mentioned, *nor approved* of by the then Mayor and one or more Alderman or Aldermen and Warden and Stewards of the ſaid Company or Fraternity, nor by a Majority of them, according to the ſaid By-Law. ‡ P. 130.

As to the 6th Iſſue—That the ſaid *Robert Green* was NOT *duly called* to be a Freeman of the ſaid *City of Durham* and *Framwelgate*, *and approved of* by the Wardens and Stewards of the ſaid Company or Fraternity of Free Maſons, Rough Maſons, *&c.* to be a Freeman of the ſaid *City of Durham* and *Framwelgate*.

This Caſe was argued on the 24th of *November* 1756, by Mr. *Ambler* for the Plaintiff, and Mr. *Clayton* for the Defendant; when the Court ordered it to ſtand for Judgment of the then next Term.

Lord *Manſfield* now delivered the Reſolution of the Court.

The General Queſtion depends upon *Robert Green*'s *Right* to the Franchiſe which He claims.

The Objection to his Right ariſes from his not being *qualified according to the By-Law*.

If the By-law is good, and binding, and he appears to be an Object of it; He is certainly not qualified, and the Mayor has returned a ſufficient Reaſon for not admitting and ſwearing him.

All the Objections which has been made, therefore, tend to *ſet aſide the By-law*; Or, if the By-law be good, to ſhew that *Robert Green*'s Caſe is *not within it*.

It has been argued that the By-law is *void*, upon two Grounds;

1ſt. From *Want of Authority* to make it;

2dly. From the *Subject Matter*.

As to the Firſt—The Objection is, That the By-laws are returned to be made by the Mayor, Aldermen, and Commonalty; whereas the Power is given to the Mayor, Aldermen, and 24 Common Council or the major Part of *them*; of whom the Mayor and Six Aldermen ſhould be Seven,

Anſwer,

‡ Page 131. ‡ Anſwer. The Power to the ſelect Number is, " to make " By-Laws in the *Stead*, *for*, and *in the Name of the whole Cor-* " *porate Body.*" Theſe By-Laws *might* be made by the ſelect Number, *acting* IN THE NAME *of the whole* corporate Body; and muſt be ſo *intended:* For the Jury find, " that they did in " *due Manner* meet, and in *due Manner* make the By-Laws."

As to the Second—That the By-Law is *unreaſonable* and *void:* For it is likened to the Caſe of the Taylors of *Ipſwich*, 11 *Co.* 53. A By-Law " that none ſhould work at his Trade, " until he had preſented himſelf to the Company of Taylors, " and proved that he had ſerved 7 Years as an Apprentice, " and admitted by them to be a ſufficient Workman."

Anſwer. In *that* Caſe, the By-Law was *againſt Law:* It was againſt the 5th of *Eliz.* and a farther Reſtraint than the Act had made.

But *this* By-Law is *not* againſt any Law—It is *not* a Reſtraint upon Trade; but ſeems a *reaſonable Regulation*, to prevent Perſons being unduly made Free, who are not intitled by Birthright, Service, or Purchaſe. It provides a Method for previouſly examining into the Right of thoſe who claim to be made free.

Obj. " That there is *no Method to compel a Meeting* of the " Mayor, Alderman or Aldermen and the Wardens and Stew- " ards of Companies."

Anſwer. This Objection extends equally to *all corporate* Aſſemblies, by Cuſtom, Charter or By-Law. But there *is* a known Method, by *Mandamus*.

Obj. If a Perſon has a *Right* to be admitted a Freeman, yet unleſs He be *approved of* by the Mayor, *&c.* He is not to be admitted: And there is *no Method to compel* them to *approve*.

Anſwer. If the Mayor, *&c.* diſapprove, without Cauſe a *Mandamus* will lie, ſuggeſting the Qualification and Right of the Perſon claiming to be a Freeman, and commanding the Mayor to approve and admit.

But Suppoſing the By-Law *good*, it has been argued, that this Caſe is *not within* it.

1ſt Obj. The *Mandamus* is, to admit *Green* to the Freedom of the *Company:* The By-Law relates only to the Freedom of the City.

Anſwer.

† Anſwer. It appears from the ſecond By-Law, to be the *ſame* thing. † Page 133.

2d Obj. The By-Law prohibits indeed the Election of Perſons not called, and approved, *&c.* and ſubjects Diſobedience to a Penalty; but does *not* make the Election *void*, and cannot transfer the Right of Election *veſted* in the Electors, to the Mayor, *&c.*

Anſwer. Theſe Objections are founded upon a *Miſunderſtanding* of the By-Law, and a *Miſconception* of the Nature of the Caſe. The Writ recites "that *Green* had been duly elect-"ed and admitted a Freeman;" and therefore commands the Mayor to ſwear him—The Mayor returns the By-law, *&c.* and "that *before Green's* ſuppoſed Election and Admittance "(by the Company) to be a Freeman, He was not called and "approved by the Mayor, *&c.*" And the Fact found by the Jury is, "That he was elected and admitted by the Compa-"ny; but not called and approved by the Mayor, *&c.*" So that it appears upon this Record, that the Intent of the By-law was, that no Perſon ſhould be elected and admitted a Freeman of the *Company*, unleſs He was called at the Aſſembly and approved, *&c.* which was a *previous* Act to be done before the Company could elect him; the way to *prevent* the Abuſe "that the Company *unduly* admitted Perſons to "their Freedom:" And the ſecond By-law inflicts a *Penalty on the Company*, who ſhould make any One Free, *without* the previous Calling and Approbation; And the third By-law inflicts a Penalty on the Mayor, who ſhould ſwear any *ſuch* Perſon.

The *Stating the Fact* anſwers both the Objections. For the By-law makes the Appearance and Approbation a *neceſſary Qualification*, to the being made free by the *Company*, and a Reſtraint upon *them* to elect any one to his Freedom, before his conforming to the By-law: And the Right of Election is *not transferred* to the Mayor, but *remains* where it was.

Obj. It is not returned "that there *was* any Aſſembly, at "which *Green* might appear, to be called."

Anſwer. It ſhall be *intended*,—And if in Fact there was no Aſſembly, *Green* might have *pleaded* it as an Excuſe.

Obj. He might have been elected and admitted, *before* the *making* this By-law.

Anſwer. The Jury have found, "that he was elected "and admitted: But that he was not called and approved "*purſuant*

‡ Page 133. " ‡ *purſuant to the By-Law.*" So that the By-Law *was in Being*, at the Time of the Election, &c.

It is to be obſerved, that it is *not ſtated*, what is the *Method* of the Company's Electing Freemen, nor any thing in the Charter concerning it. For aught that appears, the Firſt By-Law *may* be agreeable to the ancient Uſage, and *revived* by this By-Law and enforced with Penalties: But ſuppoſing it to be *introductory* of a previous Qualification, it ſeems to be *reaſonable* and well calculated to prevent improper Perſons, not intitled, being made free. It is much more reaſonable than the Cuſtom of *London*, " that no Broad Cloth ſhould be ſold, " but what was brought to *Blackwell-hall* to be examined;" 5 *Co.* 62. Yet this Cuſtom was held good; becauſe it was to *prevent Fraud.*

We are of Opinion that *None* of the Objections are well founded; and therefore that the *Return* ought to be *Allowed.*

Conſequently, as this was the Caſe of traverſing a Return to a *Mandamus*, purſuant to the Statute of 9 *Ann. c.* 20. the Rule was taken,

That JUDGMENT be entered for the DEFENDANT.

Friday 18th Jan. 1757. Goodtitle, ex dimiſſ. Cheſter, *verſ.* Alker & Elmes.

Tr. 26, 27 *G.* 2. *Rot.* 590.

THIS Caſe was firſt argued on *Tueſday* the 4th of *February* 1755, when there were only 3 Judges; Mr. Juſt. *Wright* having (two Days before) reſigned, and Mr. *Wilmot* (who was appointed to ſucceed Him) not being then called a Serjeant: And it was again argued, and determined, on this Day, (when Mr. Juſt. *Wilmot* was alſo abſent, in the Court of Chancery.)

It was a Special Verdict in Ejectment for *an Acre of* LAND lying in the Pariſh of St. *Philip and Jacob* in the County of *Glouceſter*. It finds, as to *One* Piece of Land, containing 14 Inches in Length, and 33 Feet in Breadth, (Parcel of the Premiſſes;) And as to *One Other* Piece of Land, containing 3 Feet 6 Inches in Length, and 7 Feet in Breadth, (other Parcel of the Premiſſes;) And as to *One Other* Piece of Land, containing 2 Feet in Depth and 14 Feet in Length, (other Parcel of the Premiſſes contained in the Declaration;) That *Thomas Cheſter*, Eſq; was in 1648 ſeiſed in his Demeſne as of Fee, of and in the Manor of *Barton Regis* in the County of *Glouceſter*, with the Appurtenances. That the ſaid *T. C.* Eſq; being ſo ſeiſed, certain Articles of Agreement were, on 24th *June*

‡ *June* 1648, made between the ſaid *Thomas Cheſter* and One *John Gotley* otherwiſe *Dowle*, reciting a Preſentment by the Homage, at a Court Leet of the ſaid Manor, holden 10th of *April* 1648, " That the ſaid *John Gotley*, *alias Dowle* in the " new Building of a Houſe at *Lafford's Gate*, had *encroached* " *upon the Waſte* of the ſaid *Thomas Cheſter* then and yet Lord " of the ſaid Manor, 14 Inches in Length and 33 Feet in " Breadth, without his Houſe; together with a Porch, " without the Wall adjoining to the ſaid Houſe, of 3 Feet " and an half; for the which Encroachment, the ſaid *John* " *Gotley alias Dowle* was by the ſaid Jury amerced; as by the " Preſentment aforeſaid, in the Rolls of the ſaid Court, ap- " peared :" The ſaid *Thomas Cheſter* and *John Gotley* thereby agreed, not only concerning the ſaid Amerciament, (whereof the ſaid *Thomas Cheſter* thereby acquitted and diſcharged the ſaid *John Gotley*:) But alſo the ſaid *Thomas Cheſter*, for the Conſideration thereafter mentioned, agreed to permit and ſuffer the ſaid *John Gotley* his Executors and Adminiſtrators, to continue the peaceable Enjoyment of the ſaid Ground and Waſte encroached, without his Diſturbance; And alſo to have Liberty to ſet and place a Poſt in the Street, *&c.* and 3 other Poſts, *&c.* without any Diſturbance or Trouble by him the ſaid *Thomas Cheſter*, *&c.* for the Term of 100 Years from the Day of the Date of the ſaid Articles. In Conſideration whereof, the ſaid *J. D. alias D.* for Him his Heirs Executors, *&c.* covenanted and agreed to pay to the ſaid *T. C.* his Heirs or Aſſigns, the Sum of 6s. 8d. *per Annum* yearly, *&c.* during the ſaid Term: In Conſideration whereof, the ſaid *T. C.* granted and agreed to let the ſaid Encroachment or Encroachments to ſtand, for and during the ſaid Term, without any Diſturbance, *&c.* So as the ſaid yearly Rent or Sum of 6s. 8d. be paid duly, *&c.* And it was further found, That the *two firſt* Pieces of Land particularly mentioned and deſcribed in the Verdict, are the two ſeveral Pieces of Land mentioned in the ſaid Articles to be encroached on by the ſaid *John Gotley* otherwiſe *Dowle*; and Parcel of the Waſte, and Part of the Tenement in the Declaration mentioned; and *were* ſo encroached and taken in by the ſaid *J. G.* otherwiſe *D.* IN *the building or erecting* the Meſſuage or Houſe mentioned in the ſaid Articles, ſome ſmall Time before the Date of the ſaid Articles; and then were lying in and Part of the ſaid Manor, and were *part of a public Street and King's Highway*, called *Weſt-Street*, in the Pariſh of St. *Philip and Jacob* in the ſaid County of *Glouceſter*, and leading from the City of *London* to the City of *Briſtol*.

‡ Page 134.

The Jury likewiſe find That the ſaid yearly Sum of 6s. 8d. was *duly and conſtantly paid*, in Purſuance of the ſaid Articles, by the Defendants and thoſe whoſe Eſtate they have, to the ſaid *Thomas Cheſter* and the Succeſſive Lords of the ſaid Manor, (his Deſcendants,) *during all* the ſaid Term of 100 Years; *and from* the End thereof, *till Lady-Day* 1750.

Then

‡ Page 135. ‡ Then they find That the *Defendants Alker and Elmes, ſometime in the Year of our Lord* 1748, erected certain *Paliſadoes* before the Front of the ſaid Houſe, and thereby *took in and incloſed the third* Piece of Land, above particularly mentioned and deſcribed, then lying in and being part of the ſaid Manor, and being then other part of the ſaid *public Street and High-way*; and have kept the ſame ſo incloſed, ever ſince, to this Time: And that *that part of the ſaid Street* where the ſaid Encroachments were ſo made, at the ſeveral Times of the ſaid Encroachments, contained in Breadth (including the ſaid Encroachments) 60 *Feet and no more.*

The Jury find *Thomas Cheſter*, Eſq; the Leſſor of the Plaintiff, to be Heir at Law to that *Thomas Cheſter*, Eſq; deceaſed, who executed the Articles; and, as ſuch, to be ſeiſed of the ſaid Manor with the Appurtenances, as the Law requires; And that, being ſo ſeiſed, He made the Demiſe to the Plaintiff: By Virtue of which Demiſe, He entered, *&c.* and was ejected, *&c.* But whether upon the whole Matter aforeſaid in Form aforeſaid by the ſaid Jurors found, the ſaid *G. A.* and *L. E.* are guilty *of the ſaid Treſpaſs and Ejectment*, AS TO *the ſaid three Pieces or Parcels of Land*, Parcel, *&c.* by them ſuppoſed to be done, or not, the ſaid Jurors are wholly ignorant, *&c.* and ſo the Verdict concludes in the ordinary Form.

Argument for the Plaintiff. The Counſel for the Plaintiff made two Queſtions; *viz.*

1ſt Queſtion—Whether an Ejectment will *lie* for theſe Premiſſes AS DESCRIBED in the Declaration.

2d Queſtion—Whether the Defendants are at Liberty to *controvert the Title* of the Plaintiff; or are ESTOPPED from ſo doing.

Firſt—It may be objected, "That no Ejectment will be "of Land which is *part of the King's Highway.*" But it is plainly and beyond Controverſy part of the *Lord's Soil*; tho' it is indeed ſaid to be part of the *Highway.* This Highway is found to be 60 Feet wide. Therefore *if enough be left* for a public Way, the *Reſt* belongs to the Lord: At leaſt, He is *not* guilty of a *Nuſance*, if he ſhould erect any thing upon the *Overplus Part of it.*

Now 60 Feet is much more than enough for any Highway: And the Encroachment is only from the Front of the Houſe; *Not in the Middle of the Highway.*

The Overplus of the Soil is not veſted in the Crown; but in the *Owner of the Soil.* 2 *E.* 4. 9. *Bro. & Fitzb. Abr.* Tit. *Chimin.* In *Tr.* 13, 14 *Geo.* 2. *C. B.* and at *Serjeants Inn, Selman* v. *Courtney*, (concerning giving in Evidence, a Right

‡ a Right to a Highway,) It was unanimouſly holden, That, † Page 136.
" in Treſpaſs, the Defendant may juſtify that it was a High-
" way, but cannot give it in Evidence; and that the *Right to the*
" *Soil* was *not* in the Crown."

If the Highway was taken out of the Lord's Waſte, the Right and Property of it is clearly in the *Lord:* And the Lord may *diſtrain* in it: So is 17 *E.* 3. 43 *Pl.* 31. If it was not taken out of the Waſte, it belongs to the Owners of the Soil on each Side. The Caſe of *Selman* v. *Courtney* (*ſupra*) was ſo determined by all the Judges.

The Owner of the Soil may cut *down the Trees*, and may have an Action for *digging* the Soil. So is 1 *Ro. Abr.* 392. *Pl.* 2. and 1 *Ro. Abr.* 392. *Pl.* 3. Title *Chimin private*, Letter B.

In the Caſe of Sir *John Lade* v. *Sheppard*, *H.* 8. *G.* 2. *B. R.* The Land was the Property of the Plaintiff, who made it a Street; and the Defendant's Bridge reſted upon it; and He had (by Leave of the Commiſſioners of Sewers) arched over the Ditch, and dug the Ground, and fixed Poſts upon it. It was holden " That this making a Street was only a Dedi-
" cation of it to the Public, for the particular purpoſe of
" *paſſing and repaſſing*; but that the *Soil* belonged to the *Own-*
" *er.*" *V.* 2 *Strange* 1004. S. C. ‡

‡ My own Note agrees with Sir *John Strange*'s. " The Property remained in the Owner of the Soil: He
" only gave the USE of it to the Public."

The General Queſtion is " Whether a *Part of a* HIGH-
" WAY *be recoverable in an Ejectment.*"

The Deſcription of a Highway is laid down in *Co. Lit.* 56. *a.* The *Property* of the Soil of the Highway (as has been already proved) is in the *Lord of the Soil.* An Action of Treſpaſs muſt be founded on *Poſſeſſion:* And an Ejectment is an Action of Treſpaſs. In *Cro. Eliz.* 339. *Jordan* v. *Cleabourne*—*per Popham* and *Gawdry.* It was holden to be but a perſonal Action, and a Treſpaſs in its Nature. Therefore the Plaintiff might be *poſſeſſed* of it; and conſequently may *recover Poſſeſſion* of it, in an Ejectment; For if he has a *Right* to the Poſſeſſion, he *muſt* have a *Remedy* for it.

It is not *every* Encroachment, that is a Nuſance to the *Public: Some* Encroachments may ſtand. *Fitzh. Abr.* 77. *a.* No. 447. 8 *E.* 3. is one Inſtance of it. But there, the *King* muſt be intended to be the *Owner* of the Soil: Otherwiſe, the Rent would have belonged to the Owner of the Soil; not to the King.

The Sheriff *may* deliver full Seiſin of the Thing here demanded. In Proof of which, they mentioned a Note of a Caſe before Lord Ch. Baron *Pengelly*, in *Wiltſhire*; where an

‡ Page 137. ‡ an Ejectment was brought for a *Cottage in the Highway*; And it was objected " That it would not lie, *becauſe* the She- " riff could not deliver Poſſeſſion :" But Ld. Ch. B. *Pengelly over-ruled* the Objection; and ſaid that Mr. Juſtice *John Powell* had been of that Opinion which Himſelf then went upon, and had done the like.

They inſiſted very ſtrongly, that the Sheriff CAN give Seiſin of the Thing; *ſubject to the Rights* of others, upon this Property, for particular *Eaſements*. *Co. Litt.* 4. *a. Cro. Eliz.* 421. *Weldon* v. *Bridgewater*. *Co. Litt.* 48. *b.* For the Rights of others are *not* to the POSSESSION; but to *mere* EASEMENTS, which are *collateral* to the Thing itſelf. *Cro. Jac.* 263. *Sir William Wrey* v. *Veſper*. And there is no Reaſon for making any Difference between *public* and *private* Eaſements. This Argument might as well be uſed in Regard to ſuch an Eaſement, as a Right to ſet up Stalls in a Fair or Market. But the Caſe of the *Mayor of Northampton* v. *Ward* in 2 *Strange* 1238, is a full Proof " that Treſpaſs is the *proper* Re- " medy for erecting *Stalls in a Market*." Now if a Perſon ſhould build a *Houſe*, inſtead of ſetting up a *Stall*; Would not an Ejectment lie, by the Owner of the Soil?

Secondly, (under the firſt Queſtion,) It will alſo be objected here, " That the Thing demanded is *not ſufficiently deſcribed*;" The Ejectment being only " for an Acre of LAND."

The Plaintiff's Counſel ſaid they did not diſpute the Caſe of *Knight* v. *Syms*, *Carth.* 204. 4 *Mod.* 97. S. C. [*V.* alſo 1 *Salk.* 254. S. C. and 1 *Shower* 338. S. C.] " That an Eject- " ment of ſo many Acres of *Arable and Paſture*, without ſhew- " ing the *Quantum* of *each* Sort, is *not* good." But they obſerved that in the preſent Caſe, two Anſwers may be given to this Objection; *viz.* 1ſt. That this is *no* Part of the *Doubt* of the Jury: Therefore the Court will not lay any Streſs upon it. 2dly. That the Special *Verdict has aſcertained* the Nature and the Quantity and the Situation of this Land; For it is found to be *part of the Waſte*, and is deſcribed even to *Inches*: So that the *Sheriff can have no Doubt*, WHAT to deliver Poſſeſſion of.

Second General Queſtion—The Plaintiff's Counſel ſaid that This is an *unconſcientious* Defence; as the Defendants have already enjoyed this a Hundred Years under theſe Articles, and have *conſtantly paid* the Rent: And therefore they are ESTOPPED from controverting the *Leſſor's Title*. They cited 1 *Salk.* 276. *Trevivan* v. *Lawrence & al*. and 2 *Ld. Raym.* 1036, 1048, S. C. in Support of this Poſition; and likewiſe to prove that not only the Parties, but alſo the *Court* and *Jury*, are *bound* by this Eſtoppel: In further

further Confirmation whereof, they alſo cited *Co. Litt.* 352. and 231. and *Litt. ſ.* 374.

† And therefore they prayed Judgment for the Plaintiff. † Page 138.

Arguments for the Defendants.

The Counſel for the Defendants began with obſerving upon particular Parts of the Verdict, which they thought to be material. As that it is expreſsly found " That part of this " Land is part of the Street, which is *Part of the King's High-* " *way.*" And the third Parcel is expreſsly found to be " *O-* " *ther* Part of the ſaid Street or *Highway.*" And the Jury likewiſe find, " That the Way is in Breadth (including the " Encroachments) 60 Feet, *and* NO *more :*" Which is FAR *from* Finding a *Surplus.* That it is *not* found " That the De- " fendants claim *under Gotley.*" That the Ejectment is for " *one Acre of* LAND with the Appurtenances :" But the Verdict deſcribes three Parcels by Inches and Feet. The Plaintiff is found to be Lord of the Manor of *Barton Regis* ; in which Manor this Waſte lies : And the two Pieces firſt mentioned are found to be encroached upon and taken in, by erecting a *Houſe* ; And that upon the third, certain Paliſadoes were erected. And the Doubt of the Jury is " Whether the De- " fendants were guilty of a Treſpaſs upon theſe *Parcels of* " LAND."

They then proceeded to their Objections.

1ſt Objection—The Plaintiff's *Demand*, and the *Finding* of the Jury, are *not agreeable* to each other ; ſo as to intitle the Plaintiff to recover, upon this Verdict. For the *Demand* is of an *Acre of* LAND, *merely :* Whereas it is found " That " a Houſe is built upon the former two Parcels." And this was a Fact within the Plaintiff's *Privity :* And therefore the Ejectment ought to have been brought *for the* HOUSE : not for the Land. So is *F. N. B. pa.* 192 : Though with a *Qu.* indeed *there.* But, however, 39 *H.* 6. 8. and *Bro. Demaunde, pl.* 14. S. C. and alſo *pl.* 5. *&* *pl.* 33. ſufficiently prove " that " the Demand ought to be, OF *an* HOUSE ; not of *Arable* " Land ; (as the Term " *Land*" imports.) So alſo do *Plowden* 168, 170. *Hyll* v. *Graunge Jenkins* 6th Centurv, *pl.* 83. *ſo.* 268. *Cro. Eliz.* 234. *Hays* v. *Allen. Co. Entr.* 642. S. C. 2 *Roll. Abr.* 704. Title *Trial, pl.* 22. and *Dyer* 47. *b. Baniſter* v. *Benjamin* (*in margine.*)

And if it was not to be thus *ſpecifically* demanded, *as* it is *at the Time* ; there could be no certainty how to *deliver Poſſeſſion.* And ſuch Specification would be liable to no Objection : For in *P.* 12 *G.* 1. *B. R. Sullivan* v. *Strange,* 1 *Strange* 695. An Ejectment " de *parte* Domûs" was holden to be Good.

But here, the Verdict *finds* What the Plaintiff's Words of Demand are *not* apt and fit to intitle Him to recover. The

† P. 139. † The Sheriff may break open a Houſe, to deliver Poſſeſſion of *Part* of it. 5 *Co.* 91. *Semaine*'s Caſe, 2d Reſolution. *Style* 238. *More* than enough, is Error: And *Leſs* is bad. In 2 *Ld. Raym.* 1470. *Bindover* v. *Sindercomb*, A Deſcription of "Part of a Houſe" was holden to be good; becauſe it ſufficed to deſcribe it *to the Sheriff*.

Where the Land may be aſcertained, by being at the Plaintiff's Peril ſhewn to the Sheriff; yet even there, it muſt be Land of the *ſame Quality*, as was demanded; (*ejuſdem generis.*) *Savile* 28. *Caſe* 67. *The Queen* v. *Aylesworth. Cro. Eliz.* 265. *Scriven* v. *Prince. Cro. Eliz.* 465. *Portman* v. *Morgan.* A Demand of Land muſt (in *our* Law) be *certain. Luttrel*'s Caſe, 4 *Co.* 87. *b.*

There was a Caſe of one *Degory Green* v. *William Johns*, in 1715, where a Houſe was actually *ſawn aſunder*: (They ſaid they had the Declaration from the Heir of the Defendant.) It was an Ejectment of an Acre of Land, but *further* deſcribed indeed,) Of which the Dean of *Exeter* was the Claimant: And, though there was no Judgment or Execution; Yet, by Conſent, the Houſe was *ſawn aſunder*, in order to deliver Poſſeſſion.

Though *ſtrict* Nicety has of late Years been gotten over, yet *ſufficient* Accuracy and Preciſion is *ſtill* neceſſary: And *part of a Houſe* can never be ſaid to be within the Deſcription of *Land*, *Co. Litt.* 4. *a.* is no Authority againſt this: Nor 4 *Co.* 87. *b.* And in *Cro. Jac.* 654. *Royſton* v. *Eccleſton*——— Ejectment "de unâ *Domo* & de uno *Pomario*" was holden good, upon the Principle of their conveying a *ſufficient Certainty*, ſo as that the Sheriff might deliver Poſſeſſion. *Palm.* 337. S. C. 11 *Co.* 55. *Savel*'s Caſe. 1 *Salk.* 254. *Knight* v. *Syms.* 1 *Show.* 338. S. C.

And it would be very dangerous, if *Certainty* of Deſcription ſhould not be *ſtrictly* kept to.

Second Objection. This appears to have been *Parcel of the Waſte*; and ought to have been *ſo* deſcribed: And alſo it is *part of the King*'s *Highway*. Therefore *No Poſſeſſion*, or no *full* Poſſeſſion, at leaſt, can be delivered of it.

P. 15 *G.* 2. *B. R.* In the Caſe of *Popple* v. *Dobſon*, "*Waſte* "*Ground*" was thought a good Deſcription: *Sed Adjourn'.* [*Cur' adviſ'*] *Cro. Car.* 511. *Mulcarry and* —— v. *Eyres and Others*, on Error in Ejectment, from *Ireland*, "*Bogge*" was holden a good Deſcription.

And

* And it being the *King's public Highway*, the Plaintiff can never have *Poſſeſſion* delivered of it. The Owner cannot levy a Fine of it: Nor can he *diſtrain* in it; as may be ſeen in 2 *Inſt.* 131. * Page 140.

In Caſes of Encroachments or Purpreſtures on it, theſe Encroachments are *upon* the *King*: And ſo is 2 *Inſt.* 272. expreſsly; "Dicitur Purpreſtura, quando aliquid *ſuper Dominum* "*Regem* injuſtè occupatur, ut, &c; vel in *Viis publicis ob*- "*ſtructis*." And the Remedy is by *Preſentment* or *Indictment*. 9 *Co.* 113. 5 *Co.* 73. *a.* 27 *H.* 8. 27. *a.* But an *Action* lies, *only* where a Man receives a *ſpecial* Injury.

How can the Plaintiff have PLENAM *Seiſinam* of this? In 1735, 8 *Geo.* 2. There was a Caſe of *Well-adviſed, ex dimiſſ. Sir Bourchier Wray & al'* v. *Foſs & al'* in Ejectment, at the Summer Aſſizes at *Exeter*. The Declaration deſcribed a Piece of Land, containing 40 Feet in Length and 4 Feet in Width, part of the Manor of *J*. But the Plaintiff was non-ſuited. For the Land was part of the *Waſte*: And upon Evidence, it appeared to be *part of the Highway*, on which the Defendant had built. Lord *Hardwicke* held "That no POSSESSION "*could be* DELIVERED *of the* SOIL *of the* HIGH-WAY; and "therefore no Ejectment would lie of it: And if it was a "*Nuſance*, the Defendant might be indicted."

In the preſent Caſe, *All* theſe three Pieces of Land are part of the *King*'s *Highway*, and are encroached upon: And the two former have *ſubſiſting* Nuſances upon them.

If a Highway lies within a Manor, It muſt be agreed (eſpecially as found here) that the Lord has *the Property of the Soil*; to be uſed *conſiſtently* with the Privileges of the Subject: But the Queſtion is, *What* REMEDY the Lord has, in Caſe of a *Nuſance* upon *ſuch part* of his Property as lies in the *King*'s *Highway*. We ſay He has *no ſpecific* Remedy, by Ejectment. The Caſe of Sir *John Lade* v. *Shephard*, 2 *Strange* 1004. does not prove that an *Ejectment* will lie: That was *not* an Ejectment; but an Action of Treſpaſs. And perhaps an Action of *Treſpaſs* might have been *here* maintained: But not an *Ejectment*. And if the Lord of the Soil ſhould recover and *continue it*, He would thereby become a *Wrong-doer*: Whereas, according to 2 *Inſt.* 294. It is the Wiſdom of the Law, ſo to reſolve, "*ut ſit Finis Litium*."

As to *Fitzh. Abridgment* 77. *a.* It is the Caſe of *the King*: And by his Prerogative, *He* may continue it, if it be no Injury to the Subject. But a Highway *muſt always continue* a Highway. *Cro. Jac.* 446. *Fowler* v. *Sanders*, fully proves "That "*cannot* be narrowed: Neither can it be incloſed."

*Page 141. * Second General Queſtion. As to the *Eſtoppel*—it does not appear that the Defendants claim *under Gotley*, therefore that Point is out of the Caſe.

Reply. It was urged by the Counſel for the Plaintiff, by way of Reply—That as to the *Eſtoppel*, the Court muſt neceſſarily *intend*, upon this Finding, that the *Defendants themſelves* paid the Rent, and erected the Paliſadoes in 1748: And the Rent which was paid *from* the End of the Term *till* 1750, muſt be preſumed to be paid by them; they being *then* in Poſſeſſion. A Special Verdict is not to be taken ſtrictly; like a ſpecial Pleading.

[‡ Obſerve, that the two Diviſions of the firſt Queſtion were counterchanged, in the Courſe of this Argument: The Counſel for the Defendants having begun firſt, with that Objection, which the Plaintiff's Counſel had taken up [by way of Prolepſis] in the ſecond Place. V. pages 137, and 138.]

As to the ‡ 1ſt Objection made by the Counſel for the Defendants—*Non Conſtat* that this Land is built upon: 'Tis only found "That in the new building of a Houſe at *Lafford's* "*Gate* aforeſaid, *Gotley* had ENCROACHED upon the Lord's "Waſte, ſo many Feet, *&c.*" But it does not follow that *Gotley* actually BUILT upon the Land, which He ſo encroached upon. For there are very *many other* Ways of encroaching upon Another's Land, *beſides* building upon it: For Inſtance, a Penthouſe *overhanging* and dropping upon it, may be an Encroachment. *No Expreſs* Fact of *building* upon this Land is found. Indeed it is ſaid in the Finding, that the third Piece of Land is *taken in* and encloſed with Paliſadoes, by the ſaid *J. Gotley*. But the Paliſadoes anſwer this Expreſſion: He *incloſed* it with *them*.

They agreed to the Doctrine of the Neceſſity of *ſufficient* Certainty in the Demand: But ſaid and inſiſted that it is *ſufficient*, if the Sheriff may know *how to deliver Poſſeſſion*.

The Term "*Land*" is ſaid by Lord *Coke*, legally to include *Caſtles*, *Houſes*, and other Buildings. *Co. Lit.* 4. *a.* And by a Grant of "all a Man's *Lands*," All his *Houſes*, Mills and Woods would *paſs*: As appears in *Luttrel's* Caſe, 4 *Co.* 87. *b.* And by the Civil Law, "Appellatione *Fundi*, "omne *Ædificium* & omnis Ager continetur." *ibidem.* Therefore, as they would paſs in a *Conveyance*, there is no reaſon why they ſhould not be included in an *Ejectment*, upon a *ſuppoſed* Leaſe: Which Leaſe, if it was a *real* Leaſe, would undoubtedly carry them.

None of the Things deſcribed in the Declaration differ from the Deſcriptions of them in the Verdict.

Indeed it is only 14 Inches in Length, that it is *pretended* any part of the Houſe now covers. But the Words are, That "whereas it was preſented that the ſaid *J. G. had encroached*

" * *croached* upon the Waſte of the Manor of the ſaid *T. C.* * P. 142.
" &c. 14 Inches in Length and 33 Feet in Breadth, *without*
" *his Houſe*; together with a Porch of three and a half Feet
" in Length and 7 Feet in Breadth, *without the Wall* adjoin-
" ing to the Houſe." Now it is *not* neceſſary that the *Court* ſhould conſider theſe two Pieces of Land, as a *Houſe*; eſpecially the latter, upon which the Porch is erected.

It is *not* found to have been a Meſſuage at the *Time* of the Demiſe laid. On the contrary, the Pieces of Land encroached upon are found to be Parcel of the Waſte, and part of the *Tenement* in the Declaration mentioned: Which Tenement is not a Houſe, but an *Acre of Land*. However, this Objection cannot overthrow the *whole* Verdict: For the *third* Parcel is clearly *Land*, and *not Houſe*.

If a Man builds upon my Land, It would be very hard if I might not, notwithſtanding this, demand my *own* LAND.

If the Ejectment was brought *de parte Domûs*, (which they did not admit that it could be,) how would the Sheriff know WHICH Part to deliver Poſſeſſion of? The Plaintiff muſt, in *both* Caſes, *ſhew* him, at his *Peril*.

Though " *Pomarium*" be good, yet it would equally be good, if called " *Land*."

As to the † ſecond Objection made by the Counſel for the Defendants, The Plaintiff's Counſel replied, that the Right is *admitted to remain in the Owner of the Soil*, to be uſed conſiſtently with the Privilege of the Subject: Which Admiſſion is ſufficient for our Purpoſe. He may dig Sand or Stones; provided He does not commit a Nuſance in the Manner of doing it. Therefore 'tis plain that He has a private Right remaining in Him. † See the Note in p. 141.

And *ad quod damnum* alters no Property: The Owner retains the old Road, *diſcharged* of the Eaſement, which is *transferred* to another Part of his Land.

The Court have nothing to do with the *Nuſance*, in this Caſe: It does not appear to the Court, to be any Nuſance to the Highway; or that Mr. *Cheſter* will continue it, if he ſhould recover the Land.

Cro. Jac. 446. was for a ſpecial Injury received from the Defendant's laying Logs in the Highway: But though the King can't narrow his Prerogative, to the Injury of the Subject, yet it does not follow from that Caſe, that the Property of the Highway is not in the Owner of the Soil.

* Page 143. * Lord *Mansfield* aſked whether they had any Note or Report of that Circuit-Caſe which was ſaid to have been determined by Lord *Hardwicke*; and by whom it was taken. But there was no Note or Report of it; And it ſeemed to have been mentioned at the Aſſizes, from ſome imperfect Recollection. He therefore proceeded to give his Opinion immediately; putting this Caſe of Sir *Bourchier Wray* out of the Way entirely; as being ſo looſely remembered and imperfectly reported, as to deſerve no Regard, nor to be at all clear and intelligible. He ſaid it was impoſſible to ſuppoſe that Lord *Hardwicke* had any Note or Memory of ſuch a Point ariſing at the Aſſizes: Otherwiſe, he would wait till he could know the true State of it from his Lordſhip, from the Deference he paid to ſo great an Authority. But from the Manner in which it is quoted, there is no ground to ſay what the State of that Caſe or Determination *really* was.

As to the Queſtion "Whether an *Ejectment will lie*, by "the *Owner of the Soil*, for the Land which is *ſubject to Paſ-* "*ſage over it* as the King's *Highway*."

1 *Ro. Abr.* 392. Letter B. *pl.* 1, 2. is expreſs—"That the "*King* has *Nothing but the Paſſage* for Himſelf and his Peo- "ple: But the *Freehold and all Profits* belong to the *Owner* of "the Soil." So do all the *Trees* upon it, and *Mines* under it (which may be extremely valuable.) The Owner may carry Water in Pipes *under* it. The Owner may get his Soil *diſcharged* of this Servitude or Eaſement of a Way over it, by a Writ of *Ad quod damnum*.

It is like the Property in a Market or Fair.

There is no Reaſon why he ſhould not have a Right to ALL *Remedies* for the *Freehold*; ſubject ſtill indeed to the Servitude or Eaſement. An *Aſſize* would lie, if he ſhould be diſſeiſed of it: An Action of Treſpaſs would lie, for an Injury done to it.

‡ V. ate, p. 135, 16. I find by the Caſe of *Selman* v. *Courtney*, *Tr.* 13, 14 *G.* 2. ‡ that a Point which had been before the Court of Exchequer in the Caſe of the Dutcheſs of *Marlborough* v. *Gray*, *M.* 2 *G.* 2. is now ſettled; *viz.* "That its being a Highway "cannot be given in Evidence by the Defendant, upon the "General Iſſue:" Which proves that the Ownerſhip of the Soil is *not* in the King. I ſee no ground why the Owner of the Soil may not bring *Ejectment*, as well as *Treſpaſs?* It would be very inconvenienc, to ſay that in this Caſe He ſhould have NO *ſpecific* legal Remedy; and that his only Relief ſhould be repeated Actions of Damages, for Trees and Mines, Salt-Springs, and other Profits under Ground. 'Tis true indeed that he muſt recover the Land, *ſubject to the*

† *the Way:* but ſurely he ought to have a *ſpecific* Remedy, † P. 144.
to recover the LAND ITSELF; notwithſtanding its being ſubject to an Eaſement upon it.

Second Queſtion—As to the *Deſcription*——

I don't know whether it is not even *better* deſcribed by the Name of the *Land*, than of a *Houſe*, or *part of a Houſe*.

I think it would have made the Objection much *ſtronger*, if the Plaintiff had only claimed the NUSANCE, inſtead of the Land on which the Nuſance is erected.

Here He does not claim the *Nuſance:* He claims the *Land*. And the Tenants in Poſſeſſion of it defend themſelves by ſaying "That they have *erected a Nuſance* upon it." Now it would be a ſtrange thing, if *that* ſhould be a good Defence againſt the Owner's recovering his *Land*.

But however, this is not a *Houſe* (which perhaps ought, if it were ſo, to be particularly named;) but merely a *Wall* or PART *of a Wall* or Building; And there is not ſuch Preciſeneſs required in *Ejectment*, as there is in *real* Actions.

The Courts will go to the utmoſt Extent, in *ſupport of Ejectments*; that People may have *ſpecific* Remedies for their Rights.

Dyer 47. *a. pl.* 6. is very ſtrong. There the Recovery was of "100 Acres of Land, 20 Acres of Meadow, and 40 "Acres of Paſture, in *D.*" without mentioning any Houſe or Garden: And the better Opinion ſeems to be "That the "Plaintiff ſhould thereby recover the *Buildings* built there-"upon."

That was an Action of a *higher* kind than an Ejectment: It was a *real* Action, a Writ of Intruſion, in which *that* Recovery was had.

But here, the building erected is only PART of a Houſe or Wall: And it is erected, *by Incroachment*, upon the Plaintiff's Land.

The Caſe of the Defendant is moſt unfavourable: For he inſiſts upon holding the Thing demanded without any Pretence of Title; and inſiſts that the Plaintiff ſhall have no ſpecific Remedy for his Land.

Therefore I am of Opinion that the Plaintiff ought to recover upon this ſpecial Verdict.

Mr. Juſt. *Deniſon* concurred.

† Page 145. ‡ Note: Mr. Juſtice *Foſter*, who tried the Cauſe, had declared this, during the Courſe of the Argument.

† The Difficulty at the Aſſizes aroſe (as the Judge who tried the Cauſe has ‡ declared) merely upon an Apprehenſion that there had been a Determination at the Aſſizes formerly, by Lord *Hardwicke*, "That an Ejectment would *not* lie for a "Property in Soil, over which there was a *Highway*; be-"cauſe the Sheriff could not deliver Poſſeſſion of the High-"way."

He ſaid He ſhould have had no doubt about it, at the Trial; but upon its being alledged "that Lord *Hardwicke*, (for whom every One has and "ought to have a Veneration,) had made ſuch a Determination;" And he would not take upon Himſelf, to over-rule the Opinion of ſo great a Man.

But the *Reality* of this Authority has not been at all proved, to any kind of Satisfaction.

Treſpaſs would undoubtedly lie: Why then ſhould not an Ejectment?

It is ſaid "That the Sheriff cannot deliver *full* Poſſeſſion."

But why not? Indeed, it muſt be *ſubject* to the Eaſement: But there is *no other* Difficulty in the Matter.

Therefore I take it for granted, that there was ſomething more in that cited Caſe of Sir *Bourchier Wray*'s, than We are now apprized of.

As to the ſecond Queſtion——

It might have been perhaps difficult to have deſcribed this *part* of a Houſe.

In that Caſe in *Dyer* 47. *a.* I take it that the Formedon in Reverter was well brought for the LAND, *ſecundùm formam doni*: The Plaintiff had nothing to do with what the Defendant had done with it, or built upon it. And I think the four Judges who held on that ſide of the Queſtion, were in the Right.

And upon this Special Verdict, the Sheriff would have no Difficulty to deliver Poſſeſſion; for any thing that I can ſee, to raiſe any.

I think that Caſe in *Dyer* is good Law, That was in a *real* Action: And much more will the ſame Reaſon hold upon *Ejectment*, (which would even lie for *Tithes*.) [*V. Cro. Car.* 301.]

And I think this Ejectment was *better* and more properly brought for *Land*, than it would have been for "*part of a* "*Houſe*."

Mr. Juſt. *Foſter* agreed that the Caſe in *Dyer* was good Law. And

‡ And he repeated, that He had no doubt of the preſent Caſe, when it was before Him at the Aſſizes, *but* from the *then*-apprehended Authority of the cited Caſe, *ſaid* to be determined by Lord *Hardwicke*. [*V. ante*, 145.] ‡ Page 146.

The Owner of the Soil has Right to ALL ABOVE *and* UNDER *Ground*, *except* only the Right of Paſſage, for the King and his People.

And the Caſe in 1 *Ro. Abr.* 392. Letter *B.* proves this. [*V. ibid. pl.* 1, 2, 3, 4, 5 & 6.]

Therefore he entirely concurred with his Lordſhip and his Brother *Deniſon*, (for Mr. Juſtice *Wilmot* was * not preſent in Court at either of the two Arguments of this Caſe,) that there ſhould be * V. ante, 133.

JUDGMENT for the PLAINTIFF.

Tooker *verſ.* Duke of Beaufort.

A New Trial had been moved for, on a ſuppoſed *Miſdirection* by the Judge who tried the Cauſe, in *admitting* a Commiſſion under the Seal of the Court of Exchequer, *P.* 33 *Eliz. Rotulo* 290. to be given in *Evidence*; although it was objected at the Trial, "That this Commiſſion was *Res inter* "ALIOS *acta*; of which the *Beaufort* Family could have *no* "*Notice*, nor *Opportunity to defend it*; and therefore it could "not *affect* them: Conſequently, it *ought* NOT *to have been* "AT ALL *admitted as Evidence*; for the ſame Reaſon that a "*Verdict* in a Cauſe between *other* Parties cannot be given in "Evidence in a Cauſe between Strangers to the former Cauſe."

N. B. This Commiſſion (*P.* 33 *Eliz. Rotulo* 290, *in Scacc'*) was directed to 5 Commiſſioners therein named, *ad inquirendum, tam per Sacr'um proborum & legalium hominum Com' nr'i South'ton, quam per Depoſitiones quorumcunque teſtium, ac omnibus aliis viis mediis & modis quibuſcunque*, "*Si Prior aut Prioratus Sci' Swithini* "*Winton, in jure Domûs ſive Prioratûs, fuit ſeiſitus in* "*quibuſdam terris vocat' Woodcrofts, &c.* UT Parcell' "*de Manerio de Hinton-Daubney*;" *Necnon*, "*Si Hen*"*ricus, Pater noſter, (in ejus vita,) Dominus Edwar*"*dus ſextus, Regina Maria, aut Nos ipſi, à tempore Diſ*"*ſolutionis Prioratûs Sci' Swithini &c. &c.*" with an Order for the Sheriff to ſummon a Jury, &c.

To

‡ Page 147. ‡ To this, is returned An Inquiſition taken the 9th of *April* 32 *Eliz.* Whereby it is found " That the Prior of St. " *Swithin*, in Right of his Priory, WAS *ſeiſed* of the ſaid " Lands called *Woodcrofts*, &c. AS *Part and Parcel of the* " Manor of *Hinton-Daubney*; and that *from* the Diſſolution of " the ſaid Priory, King *H.* 8. King *E.* 6. and Queen *Mary* " were ſeiſed, and Queen *Elizabeth* Herſelf, in the ſame " Right, to the 27th of *May* then laſt paſt."

There are alſo returned the Interrogatories adminiſtered on her Majeſty's Behalf, and the Depoſitions taken thereon.

The Subſtance of the Judge's Report was, That He *admitted* this *Commiſſion* and the *Return* to it, and the *Depoſitions*, to be read in Evidence; Holding them to be *admiſſible* Evidence, though *not* concluſive. That there was likewiſe much *Parol*-Evidence of the Poſſeſſion of *both* Parties; and that there had been a *mixed* Poſſeſſion: But that He, in his Direction to the Jury, did lay great *Streſs* on this *Commiſſion*, &c. And that *without its Aſſiſtance*, He ſhould have thought the Verdict for the Plaintiff to have been a very hard One.

The Report concluded, " That He Himſelf (the Lord " Ch. Baron) thought this Piece of Evidence to be *admiſſible*, " but *not* concluſive. That it had great Weight with the Ju- " ry; And that if the Court ſhould be of Opinion that it was " *not* admiſſible, He thinks there ought in *that* Caſe to be a " new Trial."

This Matter having been largely debated at the Bar, and afterwards fully conſidered by the Bench; And the Court having been of Opinion " That the Evidence *was admiſſible*, " though *not concluſive*; and therefore that it was well and " properly received;" And conſequently, " That the Rule " for ſhewing Cauſe why there ſhould not be a new Trial, " ſhould be diſcharged;" The ſaid Rule had been according- " ly diſcharged.

But in the Interim, whilſt this Queſtion was depending before this Court, (who took Time to adviſe upon it,) The Duke of *Beaufort*, the Defendant DIED.

Whereupon, (on *Saturday* 13th *November* 1756) Mr. *Gould*, on Behalf of the Plaintiff, moved for Leave to *enter up his Judgment*, as of the *next Term after the Verdict*; Which was the Term in which He *might* have entered it up, if the Motion had not obſtructed it. 1 *Leon.* 187. *Iſley*'s Caſe. —It is diſcretionary in the Court to grant this or not. 1 *Sid.* 462. *Criſpe and Jackſon* v. *Mayor of Berwicke*, in Point. 1 *Ventr.* 58, 90. S. C. in Point. And in *Hilary*

† *Hilary* Term laſt, the Caſe of *Wyndham* v. *Chetwynd* S. P. (though a premature application.) † Page 148.

Lord MANSFIELD—It ſeems reaſonable: Take a Rule to ſhew Cauſe.

And

On *Friday*, 28th *January* 1757, On Mr. *Gould*'s Motion, This laſt Rule (for entering up the Judgment, as of the Term next after the Verdict,) was made ‡ abſolute, without Defence. ‡ V. poſt. p. 226. S. P.

Rex *verſ.* Maurice Jarvis. Saturday, 29th January, 1756.

THIS was a conviction, (which ſtood in the Crown-Paper) upon 5 *Ann. c.* 14.

It was made by *John Eyteſea* and *John Turner* Eſqrs. two Juſtices of the Peace for the County of *Wilts*; and was to the Effect following——

Be it remembered, that on, &c. *John Webb* of the Pariſh of *Hilperton* in the County of *Wilts* aforeſaid, Yeoman, in his own proper Perſon, cometh before Us, &c. Juſtices, &c. And now he giveth us the ſaid Juſtices to underſtand and be informed, That One *Maurice Jarvis* of *Trowbridge*, in the County of *Wilts*, Labourer, within three Months now laſt paſt, that is to ſay, on the 4th Day of *September* now laſt paſt, in the 28th Year, &c. with Force and Arms, in a certain Field commonly called, &c. lying and being within the Pariſh and Manor of *Hilperton* aforeſaid in the County of *Wilts* aforeſaid, did unlawfully keep and uſe, and had in his Cuſtody and Poſſeſſion One Setting-Dog and Setting-Net for the Deſtruction of the Game; and did *then* and there ride with and hunt the ſaid Setting-Dog with an Intent to kill and deſtroy Game; He the ſaid *Maurice Jarvis* at the Time and Place when he ſo kept and uſed the ſaid Setting-Dog and Net and had the ſame in his Cuſtody and Poſſeſſion, *was* NOT *qualified* BY ANY LAWS OR STATUTES OF THIS REALM, *to kill Game or keep or uſe any Nets* Dogs or other Engines for the Deſtruction of the Game; contrary to the Form of the Statutes in that Caſe made and provided. And thereupon afterwards, that is to ſay on the ſaid 12th Day, &c. at &c. aforeſaid, *Thomas Webb*, Servant and Game-keeper to *Edward Eyles*, Eſq; for the Manor of *Hilperton* aforeſaid in the County of *Wilts* aforeſaid, a credible Witneſs in this behalf, in his own proper Perſon, cometh before Us, &c. and taketh his Corporal Oath on the Holy Goſpel of God, to ſpeak the Truth of and concerning the Premiſſes abovementioned and ſpecified in the ſaid Information before

‡ Page 149. ‡ fore Us the ſaid, &c. the Juſtices aforeſaid, having ſufficient Power and Authority to adminiſter the ſaid Oath to the ſaid *Thomas Webb* in this behalf: And the ſaid *Thomas Webb* being ſo ſworn as aforeſaid, afterwards, that is to ſay, on the ſaid 12th Day, &c. upon his ſaid Oath ſo taken before Us the ſaid Juſtices as aforeſaid, ſaith depoſeth and ſweareth, of and concerning the Premiſſes aforeſaid in the ſaid Information abovementioned and ſpecified, "That, &c. [fully proving the "Fact;] He the ſaid *M. Jarvis*, at the *Time* and Place *when* "he ſo kept and uſed the ſaid Setting-Dog and Net and had "the ſame in his Cuſtody and Poſſeſſion, *was* NOT QUALI-"FIED *by* ANY *Laws or Statutes of this Realm, to kill Game,* "*or to keep or uſe any Nets Dogs, Guns or other Engines* for the "Deſtruction of Game, contrary to the Form of the Statutes "in that Caſe made and provided."

Whereupon the ſaid *M. J.* having firſt been duly ſummoned in this behalf to anſwer the Premiſſes, and having had due Notice thereof, afterwards, that is to ſay, at the Houſe of &c. appearing and being preſent in his proper Perſon before Us the ſaid, &c. And the ſaid *Thomas Webb* the Witneſs aforeſaid alſo appearing and being preſent before Us the ſaid Juſtices; And the Information aforeſaid and the Matter therein contained, and alſo the ſaid Evidence thereupon given, having been heard and underſtood by the ſaid *M. J.* in the Preſence of the ſaid *Thomas Webb* the Witneſs aforeſaid and of Us the ſaid Juſtices; He the ſaid *Maurice Jarvis* is aſked by Us the ſaid Juſtices, "If he the ſaid *M. J.* hath, knoweth, "or can ſay any thing for himſelf in his own Defence, touch-"ing and concerning the Premiſſes aforeſaid; and why he the "ſaid *M. J.* ſhould not be convicted of the Premiſſes afore-"ſaid, charged on him in and by the ſaid Information."

And the ſaid *Maurice Jarvis*, now here before Us the ſaid Juſtices, DENIES *that he did* KEEP AND USE the ſaid Setting-Dog and Net, and had the ſame in his Cuſtody and Poſſeſſion, in Manner and Form as above charged on him; But *ſhews* NO *ſufficient Cauſe before Us* the ſaid Juſtices, *why he ſhould not be convicted* of the Offence abovesaid charged on him in the ſaid Information. And upon hearing and examining the whole Matter aforeſaid, and every thing alledged by the ſaid *Maurice Jervis* touching and concerning the Premiſſes aforeſaid, It manifeſtly and plainly appears unto Us the ſaid Juſtices, That the ſaid *M. J.* was not THEN *any wiſe qualified impowered licenſed or authorized, by or according to the* LAWS OF THIS REALM, to kill Game: And that the ſaid *M. J.* is guilty of the Premiſſes abovesaid charged on him in and by the ſaid Information.

There-

Therefore it is now here conſidered and adjudged by Us † Page 150.
the ſaid Juſtices, that the ſaid *M. J.* upon the Teſtimony of the ſaid *Tho. Webb* the Witneſs aforeſaid, on his Oath before Us the ſaid Juſtices ſo taken as aforeſaid, be and is convicted of the Premiſſes aforeſaid, according to the Form of the Statutes in ſuch Caſe made and provided; And that the ſaid *M. J.* do forfeit the Sum of 5*l.* for the Offence aforeſaid, as the Statute directs, *&c.*

Mr. *Gould*, for the Defendant, took Exceptions to his Conviction.

1ſt. The Juſtices have *not* SHEWN *that they had* JURISDICTION *over* this Defendant. For they have not ſufficiently ſhewn his DEFECTS *of Qualification*; which ought to have been SPECIFICALLY *particularized*, with an Allegation "that he had not *any One* of them:" I mean the Qualifications mentioned in 22 & 23 *C.* 2. *c.* 25.

To prove this to be neceſſary, he cited *Rex* v. *Ellers*. [*Qu.* what, or where, or when.] *H.* 12 *G.* 1. 2 *Ld. Raymond* 1415. *Rex* v. *John Hill*; moſt directly in Point. *Bluet, Qui tam*, v. *Needs*, *P.* 9 *G.* 2. in *C. B.* (entered *Tr.* 7, 8 *G.* 2.) *Comyns* 522, 523. *Paſ.* 9 *G.* 2. (which he alſo cited, to ſhew the Diſtinction between a Declaration and a Conviction;) A *General* Averment is ſufficient in a Declaration: But *Convictions* muſt ſet forth WHAT *was the* WANT *of Qualification.*

M. 19 *G.* 2. *B. R. Rex* v. *Pickles*, [the 2d Exception in that Caſe;] Where it was indeed holden that it was not neceſſary to inſert the *inferred or argumentative* Qualification (collected from 5 *Ann. c.* 14. but not mentioned in 22 & 23 *C.* 2.) "of his not being Lord of a Manor:" But it was there agreed, that thoſe required by the Act *of* 22, 23 *C.* 2. *c.* 25. *ought* to be negatively ſpecified.

1 *Strange* 497. *Rex* v. *Sparling*, *H.* 8 *G.* 1. *B. R.* which was a Conviction for Swearing: And his Occupation was therein ſaid to be a Leather-dreſſer; but it was not ſhewn that he was not a Servant, Labourer, Common Soldier, nor Seaman. The Court held, that giving Him the Addition of Leather-dreſſer was not enough; and inſtanced the *Neceſſity of ſpecifying the Particulars* of the Defendant's want of Qualification, in *Convictions on the Game-Act*; in order to give the Juſtices a Juriſdiction which they, otherwiſe, *have not*: And they alſo held that Conviction naught, becauſe the particular Oaths and Curſes were not ſet forth. And that Conviction was accordingly quaſhed.

2d Exception. The Witneſs was examined privately and *ex parte, prior to the Appearance* of the Defendant, and *in the Abſence*

†P. 151. † *Abſence of the Defendant*, So that the Defendant had *no Opportunity of Croſs-examining* Him.

3d Exception. The *Time when* the Defendant was unqualified is not at all aſcertained, in the Adjudication of his being guilty. For it is only averred "That he was THEN unqualified:" But *ſeveral* Days and Times, *diſtinct from* each other, have been antecedently mentioned. [*V.* 148, 149, 150.

Mr. *Norton contra*, for the Conviction, began with the 2d Exception—It was *neceſſary* for the Juſtice to take a *previous* Examination, as a Ground and Foundation for his iſſuing the Summons: And when the Defendant attended, after having been ſummoned, the Evidence was then read to him; and the Witneſs alſo attended; and the Defendant was aſked "what he had to ſay for himſelf;" and did not deſire to croſs-examine the Witneſs.

To the 1ſt Exception—He anſwered—firſt, by citing *Rex* v. *Chandler*, in 1 *Ld. Raym.* 581. Where *Holt*, in delivering the Opinion of the Court upon a Conviction for Deer-Stealing, ſays "that it is *ſufficient* for the Juſtices, to purſue the "WORDS of the Statutes; and they are not, in theſe ſummary Convictions, confined to *nice and ſtrict legal* FORMS; "it is enough, if they purſue the *Intent* of the Statutes."

If the Defendant is *really* qualifed, *he* may ſhew it: But how can the PROSECUTOR *prove the* NEGATIVE? Some of the Qualifications are ſuch *as cannot* well be proved in the *Negative:* But it is eaſy for *him* to prove the *Affirmative.*

Tr. 9 *G.* 2. *Rex* v. *Ford*—Conviction for keeping an Alehouſe, without Licence. Objected, That there was another former Law upon which He might have been convicted: And in 3 *C.* 1. *c.* 3. there is a Proviſo to exempt ſuch as have been ſo. But *Cur'.* held that if the Defendant had been before puniſhed upon 5, 6 *E.* 6. *c.* 25. he might have ſhewn this. *V.* 1. *Strange* 555. S. C.

Rex v. *Theed*, 1 *Strange* 608. Conviction for obſtructing an Exciſe-Officer, who came to weigh Candles. Objection, That the Exciſe-Officer's Entry might have been by Night, (by 8 *Ann.* c. 9:) And then there ought to have been a Conſtable preſent. *Cur.*' That might have been ſhewn on the Part of the Defendant, if in Fact ſo; And then he would not have been convicted: But they would not preſume it.

Now here, the Defendant did not inſiſt upon being any way Qualified; but only denied the Commiſſion of the Fact. This

* This Conviction *follows the very Words* of the Act of Queen *Anne:* which does *not* enumerate the Qualifications, as that of *C.* 2. does: And this Conviction is on the † Act of Queen *Anne*; and not on 22, 23 *C.* 2. *c.* 25. *Page 152. †5 Ann. c. 14.

10 *Mod. (Lucas) pa.* 27. *Queen* v. *Matthews, Tr.* 10 *Ann. B. R.* [1ſt Exception.]

Viner's Abr. Tit. *Game,* Letter A. *fo.* 3. S. C.

Burn, Tit. *Game, fo.* 304. S. C. Which was a Conviction on 5 *Ann. c.* 14. Where one of the Qualifications (*viz.* not being a Game-keeper, *&c,* being a new Qualification allowed by that Act) was omitted. And *Cur.*' held that it was *not neceſſary* to enumerate ANY: But *as* SOME of them were enumerated, it was fatal to omit *another* of them. [*N. B.* This Caſe was *adjourned.*]

Rex v. *Marriot,* 4 *G.* 1. (1 *Strange* 66.) was the very Point. It was holden indeed that the WITNESS cannot take upon *Himſelf* to adjudge the Qualification: But no notice at all was taken, in the Determination of that Caſe, of the JUSTICE not having adjudged it.

Clearly, this Defect can, at the utmoſt be only *Form:* For in Subſtance, 'tis the ſame thing. And it follows the Act of 5 *Anne* in Terms.

As to the Caſe cited by Mr. *Gould,* of *Rex* v. *Ellers*—It does not appear what the State of the Caſe was.

And the Caſe in *Comyns* 522, 523. rather makes for Us. It is as reaſonable that the Defendant ſhould make it out that he was qualified, and ſhew how, on a *Conviction* as in an *Action.*

In the Caſe of *Rex* v. *Fickles,*—The Conviction was affirmed: And yet a Qualification within the Acts was omitted.

And this Law can never, or hardly ever be executed, if the Court ſhould think themſelves bound down by the Caſe of *Rex* v. *Hill* [in 2 *Ld. Raym.* 1415.]

3dly. As to the third Exception——

But Lord *Mansfield* ſtopt him from proceeding, and alſo Mr. *Gould,* from replying: For he ſaid it was needleſs to enter into *many* Reaſons for quaſhing this Conviction, when *One* alone is *fully* ſufficient.

It

† P. 153. (1ſt Exception.)

† It is now ſettled, by the uniform Courſe of Authorities, that the Qualifications MUST *be All* negatively ſet out: Otherwiſe, the Juſtices have *no Juriſdiction* over the Perſons killing Game, or keeping Dogs or Engines for the Deſtruction of it.

The *Obiter* Saying in 10 *Mod.* (if it was a Book of better Authority than it is,) would ſignify Nothing when the *Determinations* are the other way.

There is a great Difference between the *Purview* of an Act of Parliament, and a *Proviſo* in an Act of Parliament.

In the Caſe of *Rex* v. *Marriot*, *Mich.* 4 *G.* 1. *B. R.* [1 *Strange* 66.] Where the *Witneſs ſwears* only generally; it was holden inſufficient: And the *Juſtices* who convict *upon the Evidence* of the Witneſs, can have no other or FURTHER Ground to go upon than what the Witneſs ſwears.

In the Caſe of *Rex* v. *Hill*, 2 *Ld. Raym.* 1415. in this Court, *H.* 12 *Geo.* 1. It is the very Point eſtabliſhed and ſettled, "That the *General* Averment is NOT ſufficient: and that it "muſt be averred that the Defendant had NOT the particular "Qualifications mentioned in the Statute, as to Degree, "Eſtate, *&c.*"

In the Caſe of *Bluet, qui tam*, v. *Needs*, *Comyns* 525. The *general* Averment "of the Defendant's not being qualified," was holden to be ſufficient upon an *Action*; though *inſufficient* upon a *Conviction.*

The Diction is obvious between an *Action* and a *Conviction.* And there it was agreed (and it is given as the Reaſon why it is not good upon a Conviction,) "that it muſt be made out, "before the Juſtice, That the Party had *no* ſuch Qualification "as the Law requires," before the Juſtice can convict him: And the Juſtice muſt return "that he had no manner of Qua-"lification."

Here, the Witneſs *ſwears* only *generally*, "That the De-"fendant was *not* qualified *&c.*" The Juſtices *adjudge* it GENERALLY, *only.* The *Stream* can go no higher than the *Spring-Head.* So the Concluſion which the Juſtices draw from the Teſtimony of the Witneſs muſt be as general as that Teſtimony.

In the Caſe of *Rex* v. *Pickles*, It was laid down as a Rule, "that the Want of the particular Qualifications required by "22 & 23 *C.* 2. *c.* 25. *ought* to be *negatively* ſet out in Con-"victions:" And the only Queſtion there was, Whether it was neceſſary to add—"Nor Lord of a Manor." *Exceptio probat Regulam:* Nor was the *general* Rule at all, doubted or diſputed, in that Caſe.

In

‡ In Indictments upon 8, 9 *W.* 3. *c.* 26. for having a Coining-Preſs, Every thing which ſhews that the Defendant had no Authority, muſt be negatively ſet out. And ſo it was done, in the Indictment of *Bell*, which was lately argued before all the Judges. ‡ P. 154.

I take the Point to be SETTLED *by the conſtant Tenor* of *all* the Authorities; And, I think, upon very good Reaſon, (if there was need to enter into the Reaſon at large, after it has been *fully ſettled* already.)

Therefore I am of Opinion that the Conviction ought to be quaſhed.

Mr. Juſt. *Deniſon* concurred with Lord *Mansfield.*

He ſaid it was a clear Caſe; And that it was fully ſettled and eſtabliſhed, " That in theſe *Convictions*, the Want of the " particular Qualifications mentioned in the Act of 22 & 23 " *C.* 2. *ought* to be *negatively* ſet out:" If not, the Juſtices have *no* Juriſdiction to convict the Defendant as an Offender. And the Evidence and Adjudication ought, *both of them*, to be, " That he has *not* theſe Qualifications, " which are ſpe- " cified in that Act; nor any of them." (1ſt Exception.)

Indeed you are not obliged to go *further* than the *Words* of *this* Act of Parliament of 22 & 23 *C.* 2. and that was the Caſe of *Rex* v. *Pickles*. But however in that Caſe, the *preſent* Point was eſtabliſhed, and taken to be indiſputable.

It is ſaid, that " It is ſufficient to lay the Offence *in the* " WORDS *of the Act of Parliament.*"

But that is *not* ALWAYS ſufficient: It *may* be neceſſary to go *further*. *P.* 28 *G.* 2. *B. R. Rex* v. *Chapman*, about robbing an Orchard, was a Caſe where the mere purſuing the Word of the Statute was *not ſufficient.*

But this Point now before Us is a *ſettled* Caſe: And therefore there is no Need to enter into *Arguments* about it.

The Conviction ought to be quaſhed.

Mr. Juſt. *Foſter* concurred.

On

‡ P. 155. Second Exception.

‡ On Negative Acts of Parliament, the Point is fully ſettled and eſtabliſhed, "that the particular Qualifications mentioned in the Purview of them, muſt be negatively ſpecified in Convictions made upon them."

By the Court unanimouſly,

CONVICTION QUASHED.

Tueſday 1ſt February 1757.

Royal-Exchange Aſſurance Company *verſ.* Vaughan.

THIS Caſe was juſt mentioned to the Court, on 18th *November* 1755; and again, on 3d *February* 1756: But was firſt argued on 7th *May* 1756; and now, laſtly, on this Day.

It was an Action of Treſpaſs, brought by the Company: And the Queſtion (upon ſpecial Verdict) was, "Whether "this Company are *at all*, or *how far* they are *liable to be* "ASSESSED *to the* LAND-*Tax*."

The Special Verdict was very long. In it were found, at large, the *Statute* of 6 *G.* 1. *c.* 18. which gave Riſe and Eſtabliſhment to this Company; and the ſeveral *Charters* from the Crown which increaſed its Fund, and enlarged its Powers beyond what they were originally intended (or at leaſt explicitly eſtabliſhed) by that Act of Parliament; The Original Foundation of it being only for Inſurance of *Ships*, with a ſmaller Fund: But the ſubſequent Charters extended their Powers, to Inſurances of *Houſes* and *Goods* from Fire, and upon *Lives*; and alſo increaſed their *Fund*.

In the above-mentioned Act of Parliament, the *Original* Fund was *expreſsly exempted* from being taxed.

Several Facts were alſo found: Particularly, the Manner in which this Company have carried on their Buſineſs, under *all* theſe Powers *jointly*, and not under each *ſeparately*.

The preſent Aſſeſſment is for their *whole* Stock, and in their *Corporate* Capacity.

They *never had* been taxed *at all*, till now. And they were now taxed, in their *Corporate* Capacity, under the Land-Tax Act of 27 *G.* 2. *c.* 4: (of which, ſee *pages* 48, 64 & 75.)

By the Act of 6 *G.* 1. *c.* 18. their Capital was 1,500,000*l*: And they were thereby *exempted from all Parliamentary Taxes*. This was only a Power to Inſure Ships and Goods at *Sea*.

A few

§ A few Years after, the very ſame Perſons obtained a Charter to extend their Power to inſure Houſes and Goods at *Land*, and upon *Lives*; and alſo to *extend their Capital* 500,000*l.* farther than the former Sum. § P. 156.

Upon the firſt Argument—

The Court ſeemed, All of them, to ſee this Matter pretty much in the ſame Light: And they all made two Queſtions; into which, they divided the whole of this Caſe; *viz.*

1ſt. Whether the *Original* Capital that was raiſed under the Act of Parliament of 6 *G.* 1. *c.* 18. (§. 2.) and was *now become* part of the Fund of the PRESENT CHARTER-*Corporation*, was exempted from Parliamentary Taxes, *by Virtue* of the exempting Clauſe *contained in* 6 *G.* 1. *c.* 17. (§. 10.) which Act of Parliament related *only* to the *Original* Company for Inſurance of *Ships*; but did not extend to the *preſent* Corporation eſtabliſhed by *Charter*; which Charter has extended their Power and *enlarged* their Capital.

2dly. Whether this *Original* Capital was the perſonal Eſtate *of the* COMPANY; and liable to be taxed *as* the COMPANY's perſonal Eſtate, in their *Corporate* Capacity: Or whether the Tax ought to have been laid upon *each individual Member* of the Company, for his *reſpective Share*, in his *own proper Ward*.

As to the firſt Queſtion—The Court were unanimous and clear, That the Exemption under the Act of Parliament of 6 *G.* 1. was *confined* to the *Original* Fund and Company eſtabliſhed by that Act; and could *not* be extended to the preſent Corporation, which was founded upon a ſubſequent *Charter* of the Crown, which neither did nor could give any ſuch Exemption.

And they thought that this *Original* Capital having been part of the *Statute*-Company's Fund, and only *continued* by the *Charter*-Corporation, made no Difference in the Caſe.

As to the 2d Queſtion, They thought it a Point of Importance and extenſive Conſequence; and therefore deſired a further Argument: Though they ſeemed inclined to think that it was PROPERLY *taxed*, as part of the *Company*'s Perſonal Eſtate, in their CORPORATE Capacity, by Virtue of the Clauſes in *fo.* 48 & 64 of 27 *G.* 2. *c.* 4. It therefore ſtood over, for an

ULTERIUS CONCILIUM.

Upon which further Argument, Lord *Mansfield* was ſo extremely clear, that He ſaid he had been endeavouring (to the utmoſt of his Power) to *raiſe* a Doubt; but could not.

In

† Page 157. † In 4, 5 *W.* & *M.* the Diſtricts and Diviſions were allotted. So that the Queſtion here is only between the DIVISIONS: Not between the *City*, and the *Company*.

And this ſpecial Verdict was only meant, (as it is plain by the Finding,) to try the *firſt* Point. Nothing is found about Shares of Proprietors: Nor was this ſecond Point then thought of.

It's plain they are to be rated AS *a* CORPORATE Body, by *fo.* 76. And to rate the *Individuals*, would be *almoſt impoſſible*. The Argument would prove too much; *viz.* that *No* Corporation could be taxed.

The *Hudſon's Bay Company* are ſaid to be rated *for their Stock:* And there is a particular Direction given, *where* the Bank of *England* are to be rated.

Mr. Juſt. *Deniſon* concurred.

The *Original* Capital raiſed under 6 *G.* 1. *c.* 18. was intended for *another Purpoſe*. The Queſtion was certainly made upon the *firſt* Point: And this ſecond Point was not, I dare ſay, at that Time, thought of. And here is nothing ſtated to bring this ſecond Point within the Clauſe in *fo.* 75 & 76 of the Act of 27 *G.* 2. *c.* 4. Therefore We cannot take this to be any more than the Common Caſe. They are taxed as a *Corporate* Body within the Clauſe in *fo.* 48: And I do not ſee how they could have been taxed otherwiſe.

Therefore Judgment ought to be for the Defendant.

Mr. Juſt. *Foſter* was of the ſame Opinion.

The 1ſt Point, He obſerved, was determined before the preſent Argument, and rightly. The Company had impoſed both upon the Crown, and upon the Adventurers, by blending their different Stocks together.

As to this ſecond Point, it can't bear a Queſtion "Whether they ſhould be taxed in their *Corporate* Capacity, *or* "*as Individuals?*" It was intended, and it is the natural and proper Way, to tax the *Corporation*, in their CORPORATE Capacity. And this is what the Act manifeſtly meant: The Tax is to be paid out of the Stock: and this will occaſion a proportionable Deduction out of the Dividends.

BY THE COURT unanimouſly, (Except that Lord Commiſſioner *Wilmot* was, at the Time of the ſecond Argument, abſent in Chancery,)

JUDGMENT for the DEFENDANT.

Maſter and Senior Fellows of John's College, Cambridge, *verſ.* Todington, Clerk.

* Page 158.
Thurſday 3d Feb. 1757.

A Prohibition had been prayed by the College, to be directed to the Biſhop of *Ely*, to prohibit Him from proceeding upon a Monition iſſued by Him againſt them, upon Mr. *Todington*'s Application and Appeal to Him, AS VISITOR *of the College:* And the College had thereupon obtained a Rule to ſhew Cauſe why a Prohibition ſhould not go. Which Rule to ſhew Cauſe was made upon a Suggeſtion "That the Biſhop was NOT *Viſitor* of the College, AS TO *Elections* into "Fellowſhips and other Offices;" and alſo, "that admitting "him to be ſo, yet the *preſent* Matter (which related to a "SOUTHWELL Fellowſhip) was NOT *within his Juriſdiction*;" For the Suggeſtion ſet forth a Deed of Covenants (all on the part of the College,) relating to a Foundation of 2 Fellowſhips and 2 Scholarſhips by Dr. *Keton*; in which Deed and Covenants, a Power is reſerved to Dr. *Keton*, to make Statutes (to which his Fellows and Scholars were to be ſworn,) ſo as they ſhould be conformable to the Statutes of the Foundreſs of the College. And there is alſo a PENALTY and Forfeiture given to Dr. *Keton* and his Truſtees, and alſo to the Church of *Southwell*; and a *Clauſe of* DISTRESS, for the ſaid Forfeiture or Penalty, upon two of the College Manors, in Caſe the College ſhould break the Covenants. The Suggeſtion adds "That Dr. *Keton*, in Fact, never gave any Statutes, or made "any Declaration, in relation to theſe Fellowſhips."

The Gravamen complained of, is a Citation from the Biſhop of *Ely* to the Maſter and Senior Fellows upon the Complaint of the ſaid *Tho. Todington*, Clerk, on his being refuſed an Election into one of theſe two *Southwell* Fellowſhips; ſhewing, "That *he was* within the Deſcription of the Endow-"ment; whereas they had choſen one *William Craven*, who "(as Mr. *Todington* alledged) was NOT *ſo*; and that the "Biſhop had alſo cited the ſaid *William Craven*, as well as "the ſaid Maſter and Senior Fellows, to appear before "Him at *Ely* Houſe, &c."

In Order to have a clear and full Conception of this Caſe, it may be neceſſary to ſpecify this Suggeſtion at large; and alſo to premiſe ſome other Particulars which are requiſite to be known: Which are, 1ſt. The *Deed* between the Executors of *Margaret* Counteſs of *Richmond* (the Foundreſs) and Biſhop *Fiſher*, confirmed by the Prior and Convent of *Ely*; 2dly. Some Extracts from *thoſe Statutes* which Queen *Elizabeth* afterwards gave to this College, and under which the College have ever ſince acted.

† P. 159. The SUGGESTION, (at large—)

Hilary Term in the 29th Year of the Reign of King *George* the Second.

England to wit. BE it remembered that on the Eleventh Day of *February* in this ſame Term, come into Court here *John Newcome* Doctor in Divinity Maſter of the College of Saint *John* the Evangeliſt in the Univerſity of *Cambridge*, and the Senior Fellows of the ſaid College; and give the Court here to underſtand and be informed, that whereas all Pleas of and concerning any Lands and Tenements, and of and concerning any Eſtate or Intereſt of Freehold, and alſo of and concerning the Conſtruction and Operation of Deeds and Writings under Seal, and of Debts ariſing thereby, and the Cognizance of the ſame Pleas, to the Lord the King and his Royal Crown eſpecially appertain and belong, and at the Common Law in the Courts of Record of our Lord the King, and not in the Eccleſiaſtical Court nor by any Eccleſiaſtical Judge, ought to be tried diſcuſſed and determined, and always hitherto have been ſo accuſtomed to be tried diſcuſſed and determined; and whereas the Biſhop of *Ely* for the Time being is *not Viſitor* of the ſaid College, *as to Elections into Fellowſhips or other Offices* in the ſaid College, nor hath any Viſitatorial Power or Juriſdiction whatſoever over the Maſter and Fellows of the ſaid College or any of them in *that* reſpect; and whereas by an Indenture Tripartite made the 27th Day of *October* in the Twenty-ſecond Year of the Reign of our Sovereign Lord King *Henry* the Eighth, Between Sir *Anthony Fitzherbert* Knight then one of the King's Juſtices of his Common Pleas and *John Keton* Doctor of Divinity and Canon of the Cathedral Church of *Saliſbury* upon the one Part, The Chapiter of *Southwell* within the County of *Nottingham* upon the ſecond Part, and the then Maſter Fellows and Scholars of the College of Saint *John* the Evangeliſt in the Univerſity of *Cambridge* upon the third Part, it was covenanted condeſcended and agreed between the ſaid Parties for them their Heirs and their Succeſſors for ever in the Form following that is to wit, Firſt, The ſame Maſter Fellows and Scholars of the College of Saint *John* aforeſaid had granted, for them and their Succeſſors for ever, unto the aforeſaid *Doctor Keton*, that *he* for himſelf, at the Nomination and Appointment as thereafter expreſſed, ſhould have *two Fellows* and two Diſciples founded and ſuſtained at the Coſts only of the ſaid Maſter Fellows and Scholars within the College of Saint *John* aforeſaid, there *to continue for ever* of his Foundation, over and above other Fellows Scholars or Diſciples then founded or thereafter to be

founded

* founded by the Foundreſs of the ſaid College or any other* Page 160.
Perſon or Perſons that then had given or thereafter ſhould give Lands or Goods to ſuch Purpoſe and Intent; And the ſaid Maſter Fellows and Scholars of the ſaid College thereby covenanted and granted unto the ſaid Sir *Anthony Fitzherbert* Doctor *Keton and unto the ſaid Chapiter*, and to their Heirs and Succeſſors, that the ſaid Fellows and Scholars or Diſciples of the Foundation of the ſaid Doctor *Keton* ſhould have and enjoy all Manner of Profits, as well Meat Drink and Wages as all other Commodities Eaſements and Liberties, *like and in as large Manner as other* Fellows and Scholars of the ſame College by the Foundreſs' Foundation of the ſame College then had or in Time then coming ſhould have in any Manner of wiſe, at the proper Coſts and Charges of the ſame Maſter Fellows and Scholars of the College of Saint *John* the Evangeliſt aforeſaid and of their Succeſſors for ever; And the ſame Maſter Fellows and Scholars by the ſaid Indenture covenanted and agreed unto the ſaid Sir *Anthony Fitzherbert* Doctor *Keton and Chapiter of Southwell* and to their Heirs and Succeſſors, that the ſame two Fellows of the Foundation of the ſaid Doctor *Keton* ſhould have receive and perceive of the ſaid Maſter Fellows and Scholars and their Succeſſors every Year twenty-ſix Shillings and eight Pence Sterling ovor and above the Wages limited to other Fellows of the Foundreſs' Foundation, that is to ſay to either of them eight Shillings and four Pence Sterling, at the Feaſts of *Eaſter* and Saint *Michael* yearly, by even Portions: Furthermore, the ſaid Maſter Fellows and Scholars of Saint *John* aforeſaid thereby covenanted and granted for them and their Succeſſors unto the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton* or the longer liver of them, that they from thenceforth ſhould have the *Nomination and Election of the ſaid Fellows* and Scholars or Diſciples during their Lives natural, and after the Deceaſe of the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton*, then the ſaid Fellows and Scholars or Diſciples ſhould be at the Nomination and Election of the ſaid Maſter Fellows and Scholars of the College of Saint *John* aforeſaid and of their Succeſſors for ever, *after and according to* ſuch Ordinance and Writing as the ſaid DOCTOR KETON *ſhould thereof make and declare by his laſt Will or otherwiſe*; PROVIDED ALWAY that the ſaid Fellows and Scholars or Diſciples ſhould be elect and choſen *of thoſe Perſons* that be or had been *Queriſters of the Chapiter of Southwell* aforeſaid, if any ſuch able Perſons in Manners and Learning could be found *in Southwell* beforeſaid: And in Default of ſuch Perſons *there*, then of ſuch Perſons as had been Choriſters of the ſaid Chapiter of *Southwell*, which Perſons ſhould be then Inhabitants or abiding *in the ſaid Univerſity of Cambridge*; and IF NONE SUCH ſhould be found able in the Univerſity aforeſaid, *then* the ſame Fellows and Scholars or Diſciples to be elected and choſen of *ſuch* Perſons that ſhould be moſt ſingular in Manners and Learning, *of what Country ſoever* they ſhould be, that

‡ Page 161. ‡ ſhould be then abiding in the ſame Univerſity. Furthermore the ſame Maſter Fellows and Scholars covenanted and granted by the ſaid Indenture unto the abovenamed Sir *Anthony Fitzherbert* and Doctor *Keton and to the ſaid Chapiter* their Heirs and Succeſſors, that when the ſaid two Fellows and two Scholars or Diſciples of the Foundation of the ſaid Doctor *Keton* or any of them ſhould chance to *die or otherwiſe depart* from the ſaid College and leaved or leaſed his or their Title or Profits of the ſame, that then immediately after that leaſing having departing or ceaſing, at the then next Time of Election of Fellows or Diſciples of the ſaid College limited by the Statutes of the College of Saint *John* aforeſaid, *other Fellow or Fellows* Diſciple or Diſciples, as the Caſe ſhould require, ſhould be *elected named and choſen* by the ſaid Maſter Fellows and Scholars, ACCORDING *to thoſe then preſent Covenants and Agreements, according to ſuch Ordinances or Will* as the ſame *Doctor Keton* SHOULD *thereof make and declare.* And alſo it was covenanted and agreed by the ſaid Indenture, that the ſaid Maſter Fellows and Scholars of Saint *John* aforeſaid, and alſo the Fellows and Scholars of the Foundation of the ſaid Doctor *Keton*, at the Time of their Admiſſion, ſhould be *ſworn to obſerve and keep* the Statutes and Ordinances that then were made, *or thereafter* ſhould be ordained and made by the ſaid Doctor *Keton*, for the Foundation of the ſaid Fellows and Scholars; *ſo that* the ſaid Statutes ſhould be conformable with the Statutes of the *Foundreſs* of the ſaid College. For the which all and ſingular the Premiſſes well and truly to be obſerved and kept by the ſaid Maſter Fellows and Scholars and their Succeſſors in Manner and form as is aforeſaid, that is to ſay, *as well for the Elections and Admiſſions of the ſaid Fellows* and Scholars and for their Finding, as for Wages yearly to be paid to the ſame, with all other Liberties Commodities and Profits likewiſe pertaining unto them, *as for all other Covenants and Agreements* with all and ſingular the Premiſſes according to the Ordinances above rehearſed, the ſaid Doctor *Keton had contented given and part* to the ſaid Maſter Fellows and Scholars, in Money Plate and other Jewels, the Value of four hundred Pounds Sterling. Further it was covenanted and agreed by the ſaid Indenture, between the ſaid Parties, for them and their Succeſſors, that *if* the ſaid Maſter Fellows and Scholars and their Succeſſors *did fail in taking admitting or receiving of the ſaid Fellows* and Scholars in any Time of Election next after the Avoidance, and † not choſen nor admitted into the ſaid College according to the Ordinances and Agreements above rehearſed, or had not nor enjoyed not their full Commodities and Profits as is aforeſaid, then the aforeſaid Maſter Fellows and Scholars and their Succeſſors *ſhould* FORFEIT as well to the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton as to the Chapiter of Southwell*, and to their Heirs and Succeſſors, in the Name of a PENALTY or Pain *for every Default made or*

† Here ſeems to be an Omiſſion or Miſtake of ſome Words.

‡ *no due Election of the ſaid Fellows* and Scholars or any of them, TWENTY SHILLINGS *for every Month* that it ſhould happen the ſaid Fellows and Scholars not to be choſen nor admitted into the ſaid College as is aforeſaid, or reſtrained of any Profits Commodities or Eaſements as is aforeſaid; and that then it ſhould be lawful as well to the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton* on their Party, *as to the Chapiter of Southwell*, and to their Heirs and Succeſſors for their Party, *into the Manors of Marſlete and Millington* in the County of York, and *into the Manor of Little Markham* in the County of *Nottingham*, *to Enter*, *and* DISTRAIN *for the ſame* Twenty Shillings and the Arrears of the ſame for every Time or Times of Forfeiture, and the *Diſtreſs to withhold until* the ſaid Twenty Shillings with the Arrearages of the ſame ſhould be to them well and truly Satisfied Contented and Paid. Alſo the ſaid Maſter Fellows and Scholars by the ſaid Indenture Covenanted and Granted unto the Sir *Anthony Fitzherbert* and Doctor *Keton*, that they the ſaid Maſter Fellows and Scholars and their Succeſſors, at every Time and Times during the Life Natural of the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton*, ſhould give Notice and Knowledge to the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton*, or to the longer Liver of them, within ſix Days, when and as often as it ſhould fortune any of the ſaid Fellowſhips or Diſcipleſhips to be void or vacant; ſo that the ſaid Sir *Anthony Fitzherbert* and Doctor *Keton* or the longer Liver of them might nominate and appoint other Fellow or Fellows Diſciple or Diſciples apt and able to have receive and take the ſaid Fellowſhips or Diſcipleſhips ſo then being void. And Whereas the ſaid Doctor *Keton did* NOT *at any Time, by his laſt Will or otherwiſe,* MAKE *or* DECLARE *any Statute or Ordinance*, other than what was contained in the ſaid above recited Indenture, *of or concerning the ſaid Fellowſhips* called *Southwell Fellowſhips*, or of or concerning either of them; Nevertheleſs the Right Reverend *Matthias* by Divine Permiſſion Lord Biſhop of *Ely*, well knowing the Premiſſes, but contriving and intending to aggrieve and oppreſs the ſaid *Maſter and* SENIOR *Fellows* of the College aforeſaid, againſt the due Courſe of the Law of this Realm, and to Diſinherit our Lord the King and his Crown, and to draw the Cognizance of a Plea which belongs to his Majeſty's *Temporal Courts* and ought there to be tried diſcuſſed and determined, *to another Trial before the ſaid Lord Biſhop*, hath lately drawn into a Plea the ſaid Maſter and Senior Fellows of the College aforeſaid, before the ſaid Lord Biſhop, by a certain Inhibition Citation and Monition bearing Date the Twenty-ninth Day of *January* in the Year of our Lord One Thouſand Seven Hundred and Fifty-ſix, Reciting that "Whereas on the Part and Behalf of the Reverend *Thomas* "*Todington* Clerk, of the ſame College, Bachelor of Arts, "it had been (with grievous Complaint) alledged and ſhewn "to the ſaid Lord Biſhop, that the Reverend *John New-*

‡ Page 162.

"*come*

‡ Page 163. " ‡ *come* Doctor in Divinity, Maſter of the ſaid College, and " the Senior Fellows of the ſame, *Unjuſtly and Unduly Pro-* " *ceeding in the Election of Fellows of* the ſaid College, did " on or about the Seventeenth Day of *March* laſt *Chooſe and* " *Elect the Reverend William Craven*, Batchelor of Arts, *into* " *a Fellowſhip*, founded by the Reverend *John Keton* " Doctor in Divinity, Vacant by the Reſignation of the " Reverend *Theophilus Lindſey* Batchelor of Arts late one of " the *Southwell* Fellows of the ſaid College as aforeſaid, and " did REFUSE *to elect and admit*, at leaſt *did* NOT *admit and* " *elect the ſaid Thomas Todington* into the ſaid vacant *South-* " *well* Fellowſhip, notwithſtanding the ſaid *Thomas Tod-* " *ington* who was an *Inhabitant abiding within* the ſaid Col- " lege and *had been Choriſter of the Church of Southwell* in the " County of *Nottingham* ſeveral Years, OFFERED *himſelf a* " *Candidate and* PRAYED *to be elected and admitted into the ſaid* " *Fellowſhip*, and NO OTHER *Choriſter of the ſaid Church of* " *Southwell*, offered himſelf a Candidate for the ſaid vacant " Fellowſhip; And that he the ſaid *Thomas Todington*, " apprehending himſelf to be greatly *injured and aggrieved* " *by the pretended Election aforeſaid* and other pretended " *Proceedings of the ſaid Maſter and Senior Fellows*, as well " by Virtue of their pretended Office as at the unjuſt Inſti- " gation Solicitation Procurement and Petition of the ſaid " *William Craven*, and juſtly fearing that he might be fur- " ther injured and aggrieved thereby, had FROM *the ſame* " and every of them, and ESPECIALLY *from the ſaid pre-* " *tended Choice and Election of the Perſon of the ſaid William* " *Craven into the aforementioned vacant Fellowſhip* in the " ſaid College, ſo made or pretended to be made by the " ſaid Maſter and Senior Fellows, notwithſtanding the ſaid " *Thomas Todington* offered himſelf a Candidate and prayed " to be Elected and Admitted into the ſaid vacant Fellow- " ſhip, and no other Choriſter of *Southwell* offered himſelf a " Candidate for the ſame: and FROM *their refuſing to elect* " *and admit*, at leaſt *not Electing and Admitting the ſaid* " *Thomas Todington into the ſaid vacant Fellowſhip*; and " *from* all and every thing that did or might follow there- " from; and *from* all and ſingular other Grievances Nulli- " ties Iniquities and Errors in Proceeding; and *from* All " other Acts Facts and Things illegally done, that might " be collected from the pretended Proceedings of the ſaid " Maſter and Senior Fellows in the ſaid pretended Election; " To *the ſaid Lord Biſhop*, VISITOR OF THE SAID COL- " LEGE, rightly and duly APPEALED, and of and concern- " ing the Nullity and Iniquity of all and ſingular the Premiſſes " aforeſaid had equally and alike principally alledged and " complained;" And alſo reciting That " whereas the ſaid " Lord Biſhop, rightly and duly Proceeding, had at the " Petition of the Proctor of the ſaid *Thomas Todington* " (Juſtice ſo requiring,) *Decreed the Inhibition Citation and*

" *Monition*

" *Monition* thereunder written, The ſaid Lord Biſhop did
" † therefore thereby authorize impower and ſtrictly injoin † P. 164.
" and command all and ſingular Clerks and Literate Perſons
" whomſoever and whereſoever, jointly and ſeverally, that
" they ſhould *inhabit or cauſe to be inhabited*, perſonally, if
" they conveniently could ſo do, otherwiſe, by publickly
" affixing the ſaid Monition for ſome Time on the outward
" Door of the Chapel belonging to the ſaid College and by
" leaving there affixed a true Copy thereof, the ſaid *Maſter*
" *and Senior Fellows*, and *alſo the ſaid William Craven*, in Spe-
" cial, and all others in General, who by Law were required
" to be Inhibited in that Behalf; All and every of whom, the
" ſaid Lord Biſhop alſo by the Tenor of the ſaid Monition
" did inhibit and injoin, that they nor any or either of them
" ſhould innovate or attempt or cauſe or procure to be done
" innovated or attempted any thing to the Prejudice of the
" ſaid *Thomas Todington* or his ſaid Cauſe of Appeal or the
" Authority or Juriſdiction aforeſaid of the ſaid Lord Biſhop,
" pending the ſaid Cauſe of Appeal and Complaint and ſo
" long as the ſame ſhould remain undecided before the ſaid
" Lord Biſhop, ſo that the ſaid *Thomas Todington* the Ap-
" pellant might have free Liberty and Power (as in Juſtice
" he ought) to proſecute that his ſaid Cauſe of Appeal and
" Complaint, under Pain of the Law and their Contempt;
" And alſo that they ſhould in like Manner CITE *the ſaid*
" *Maſter and Senior Fellows* and alſo the ſaid *William Craven*,
" or cauſe them to be peremptorily cited *to* APPEAR *before*
" *the ſaid Lord Biſhop* at his Manſion Houſe commonly call-
" ed *Ely* Houſe ſituate in the Pariſh of Saint *Andrew Hol-*
" *bourn* in the County of *Middleſex*, on *Monday* the ninth
" Day of *February* then next enſuing, between the Hours
" of Three and Six in the Afternoon of the ſame Day, then
" and there *to* ANSWER *to the ſaid Thomas Todington* in his
" ſaid Buſineſs of Complaint; and further to do and receive
" as to Law and Juſtice ſhould appertain, under Pain of the
" Law and their Contempt; And Moreover that they ſhould
" Moniſh or cauſe to be moniſhed Peremptorily, in like man-
" ner, the ſaid *Maſter and Senior Fellows and Officers* of
" the ſaid College in Special, and all Others in general,
" that they ſome or one of them ſhould *tranſmit or cauſe to be*
" *tranſmitted* to the ſaid Lord Biſhop, at the Time and place
" aforeſaid, All and ſingular the Statutes Acts Original
" Exhibits Books Indentures Miniments Inſtruments and
" Proceedings in or any wiſe concerning the ſaid pre-
" tended Election or the ſaid Cauſe of Appeal and Com-
" plaint and more eſpecially the Statutes Books and Inden-
" tures in the thereunderwritten Schedule mentioned, under
" Pain of the Law and their Contempt; And what they
" ſhould do in the Premiſſes, they ſhould duly certify to the
" ſaid Lord Biſhop, together with the ſaid Monition: And
" the ſaid Lord Biſhop hath annexed the following Sche-
" dule to the ſaid Monition, (To wit) The Original Sta-
" tutes of the College given by Queen *Elizabeth* or an au-
" thentic

†Page 165. " † thentic Copy thereof, The Indenture bearing Date the " twenty-ſeventh Day of *October* in the twenty ſecond Year " of the Reign of King *Henry* the Eighth relating to Doc- " tor *Keton*'s or the *Southwell* Fellowſhips founded in the " ſaid College, The Book or Books wherein the Election " of Fellows and the Proceedings thereon are entered, The " Book of Battles or Buttery Book for the Months of *Fe-* " *bruary* and *March* laſt;" as by a Copy of the ſaid Monition and Schedule thereto annexed, here in this Court read more fully appears. And although the ſaid Maſter and Senior Fellows of the ſaid College *have pleaded and alledged* all and ſingular the Matters aforeſaid by them above ſuggeſted and alledged, before the ſaid Lord Biſhop, in their Diſcharge of and from the Premiſſes aforeſaid; and have *offered to prove* the ſame by undeniable Teſtimony and Proof; Yet the ſaid Lord Biſhop hath wholly *refuſed to receive or admit the ſaid Plea Allegation and Proof*, and them by Definitive Sentence of the ſaid Lord Biſhop, in the ſaid Premiſſes, with all his Might doth endeavour and daily labour to condemn; in great Contempt of our Lord the now King and his Laws, and to the great *Damage and Injury of the ſaid Maſter and Senior Fellows* of the ſaid College: All which ſaid Premiſſes the ſaid Maſter and Senior Fellows of the ſaid College are ready to verify and prove, as this Court here ſhall direct. Wherefore the ſaid *Maſter and Senior Fellows* of the ſaid College, imploring the Aid and Munificence of this Court here, pray Relief and his Majeſty's *Writ of Prohibition* to be directed to the ſaid Lord Biſhop in this Behalf, *to prohibit him that he do not any further hold Plea before him*, touching the Premiſſes aforeſaid or any Part thereof. And it is granted to them, *&c.*

The *Deed.*

Suppreſſio Domûs Sancti Johannis in Cantab.

THIS Indenture made the twelfth Day of *December* in the ſecond Year of the Reign of our Sovereign Lord King *Henry* the Eighth, Between the Reverend Father in God *Richard* Biſhop of *Wincheſter John* Biſhop of *Rocheſter* Sir *Charles Somerſet*, Knt. Lord *Herbert* Sir *Thomas Lovell* Knight Sir *Henry Marney* Knt. Sir *John Saint John* Knt. *Henry Horneby* Clerk and *Hugh Aſheton* Clerk, *Executors of the Teſtament of the* excellent Princeſs *Margaret late Counteſs of Richmond and Derby* and Grand-Dame to our ſaid Sovereign Lord King *Henry* the Eighth, on the one Party, and the Reverend Father in God *James Biſhop of Ely* and *Ordinary of the Houſe or Priority of St. John in Cambridge*, on the other Party, Witneſſeth, That Whereas our Holy Father the Pope by his Bulls under Ledd, for the Increaſe of Virtue Learning and Doctrine and Preaching of the Word of God, and to the eſtabliſhing of Chriſt's Faith,

† Faith, and for divers Conſiderations expreſſed in the ſaid † P. 165.
Bull, Hath *ſuppreſſed* extinguiſhed and determined the Foundation and Religion of the *ſaid Houſe and Priory*, by the Royal Aſſent of our ſaid Sovereign Lord the King that now is, by his Letters Patents under his Great Seal, and alſo by the *Aſſent and Agreement* of the ſaid Reverend Father *James Biſhop of Ely*, confirmed by the Prior and Convent of the Cathedral Church of *Ely*, as in the ſaid Bulls Letters Patents and other Writings thereof made, more plainly appeareth; it is now covenanted betwixt the ſaid Parties and fully concluded, and *by the ſaid Reverend Father Biſhop of Ely granted*, that *he*, for the better Execution and Aſſurance of the Premiſſes, ſhall before the ſixteenth Day of *January* next enſuing after the Date of theſe Preſents, avoid and cauſe to be avoided and removed out of the ſaid Houſe and Priory, all ſuch and as many religious Perſons as now be incorporated and poſſeſſed in the ſaid Houſe and Priory of Saint *John*, or that can or may pretend or claim any Right Title or Intereſt in or to the ſaid Houſe or Priory or to the Poſſeſſions thereof, by reaſon of their Poſſeſſion or Incorporation within the ſame; and utterly make void and diſpoſe the ſaid religious Perſons from the ſaid Houſe and Priory, and all ſuch Right Title Claim and Intereſt as they are or any of them have pretended or claim to have within the ſame Houſe and Priory or to the Poſſeſſions or to any thing thereunto belonging; and alſo cauſe the ſame religious Perſons and every of them, by Authentic Inſtrument, in ſure and ſufficient Form to be made, to reſign and renounce all ſuch Right Title Claim and Intereſt as they are or any of them have or in any manner of wiſe may have to the ſaid Houſe or Priory or to the Poſſeſſions or to any thing thereunto appertaining; And that the ſame Biſhop ſhall tranſlate or cauſe to be tranſlated all the ſame religious Perſons into other Houſe or Houſes of the ſame Religion, and cauſe them and every of them clearly to renounce relinquiſh and leave the ſame Houſe and Priory and all the Poſſeſſions thereof, and clearly to depart and to be utterly excluded from the ſame for ever, and to be really and effectually accept and incorporate in ſome other Houſe or Houſes of the ſame Religion; and cauſe the ſaid Houſe and Priory of Saint *John* and the Foundation and Corporation thereof to be clearly diſſolved and determined for ever, before the ſaid 16th Day of *January* next enſuing. And alſo the ſaid *Biſhop of Ely covenanteth* and granteth to the ſaid Executors by theſe Preſents, that *he*, before the Feaſt of the Purification of our Lady next enſuing, and at all Times after, when he ſhall be reaſonably required by the ſaid Executors or any of them, *ſhall make and cauſe to be made all ſuch Grants and Aſſurances* TO THE SAID EXECUTORS *their Heirs and Aſſigns*, OF *the ſaid Houſe and Priory* of Saint *John*, and *of all* the Manors Lands Tenements and Poſſeſſions and all other that belongeth and at any time belonged thereunto, To have and hold *to the ſame Executors their Heirs and Aſſigns*,

‡ P. 167. ‡ *ſigns*, as ſhall be adviſed by the Learned Counſel of the ſame Executors, their Heirs and Aſſigns or any of them, at their Coſts and Charges; and *cauſe* all the ſame Grants and Aſſurances *to be confirmed* by the Prior and Convent of the ſaid Cathedral Church of *Ely*, by their Deed and Deeds ſealed with their Common Seal, in ſuch wiſe as ſhall be adviſed by the ſaid Executors or any of them; ſo that the ſaid Executors or ſome of them, by Reaſon and Authority of the ſaid Bulls and of the ſaid Letters Patents and other Premiſſes, may make lawful perfect and ſure Tranſlation of the ſaid Houſe and Priory of Saint *John* and the Poſſeſſions thereof, unto a perpetual COLLEGE, of a perpetual Maſter and Fellows, and there *erect found and eſtabliſh a perpetual* COLLEGE, of a perpetual Maſter and Fellows, *according to the Will Mind and Intent of the ſaid Princeſs, and according to the Ordinances and Statutes of the ſaid Executors*, thereof to be made by Virtue and Authority of the ſaid Bulls and Letters Patents, there perpetually to endure; And on this, the ſaid *Biſhop of Ely covenanteth and granteth to the ſaid Executors*, by theſe Preſents, that the ſame Biſhop and his Succeſſors, and alſo the ſaid Prior and Convent of the ſaid Cathedral Church of *Ely* and their Succeſſors, ſhall at all times do and cauſe and ſuffer to be done all things neceſſary and requiſite for the ſaid Tranſlation and for the Foundation and eſtabliſhing of the ſaid College for ever to endure, as by the Learned Counſel of the ſaid Executors or any of them ſhall be adviſed, at the Coſts and Charges of the ſaid Executors. And the ſaid *Executors*, by theſe Preſents, *permit and grant to the ſaid Reverend Father Biſhop of Ely*, that the ſaid *Maſter and Fellows*, within one Month next after that they ſhall be founded and have real and corporal Poſſeſſion of the ſame Houſe and Priory and of the Manors Lands and Tenements and Poſſeſſions of the ſame, *ſhall grant*, by their ſufficient Writing under their Common Seal, for the Exhibition and Finding of the ſaid religious Perſons during their Lives, to every of them or to other Perſons at their Nomination, an Annuity of 6*l.* 13*s.* 4*d.* by the Year, to be had and perceived to every of them during their Lives, out of the ſaid Houſe, Manors Lands and Tenements, at Two Feaſts of the Year, that is to ſay *Eaſter* and *Michaelmas*, by even Portions, with a ſufficient Clauſe of Diſtreſs in the ſame Houſe and in all the ſaid Manors Lands and Tenements, for ſake of Payment of the ſame. And the ſaid *Executors covenant and grant to the ſaid Reverend Father in God Biſhop of Ely*, by theſe Preſents, that after the ſaid Tranſlation of the ſaid Houſe and Priory and Foundation of the ſaid College, the ſame Executors, in their Statutes and Ordinances thereupon to be made and ordained for the Ordering and Continuance of the ſame College, *ſhall ordain and eſtabliſh* (among other things) that the *Juriſdiction Ordinary of the ſame College* and of the ſaid Churches and Chapels thereunto belonging *ſhall appertain and belong to the ſame Biſhop and his Succeſſor for evermore*, and that the Maſter and Fellows

ſhall

† ſhall pray for the good Eſtate of the ſaid Biſhop during his † Page 168.
Life, and for his Soul after his Deceaſe, *as the* SECONDARY *Founder* Benefactor and Partner in the ſaid Holy and Meritorious Work, And alſo for the good Eſtate of all his Succeſſors in Time to come Biſhops of *Ely*, during their Lives, and for the Souls of his Predeceſſors Patrons and Founders of the ſaid Houſe and Priory, and for the Souls of his Succeſſors *as ſecondary Founders of the ſaid College*; And on that, the ſaid Executors ſhall provide and make Statutes and Ordinances of the ſaid College; in ſuch Manner that there ſhall not be any Ambiguity in the Elections of the Maſters and Fellows of the ſaid College. And alſo the ſame Executors granten to the ſaid Reverend Father in God Biſhop of *Ely*, by theſe Preſents, that the ſame Reverend Father in God, during his Life, ſhall name and chooſe three apt and able Perſons, Scholars; And his Succeſſors, after his Deceaſe, one apt and able Perſon, Scholar; to be made Fellows of and in the ſaid College, and there to be accepted and admitted Fellows of the ſame College, at their Nomination and Election; and that to be renewed and uſed, as oft as the Place of any of them ſhall happen to be void: And on that, the ſaid Executors granten to the ſaid Reverend Father in God Biſhop of *Ely*, that they ſhall ordain and provide in the ſaid Statutes, that the Maſter and Fellows of the ſaid College ſhall be bounden to pray for all ſingular Perſons as well alive as dead, for the which the ſaid religious Brethren of the ſaid Houſe and Priory were bound to pray, in like wiſe as the ſaid Executors have before this time promiſed and covenanted with the ſame Reverend Father in God to be done. In Witneſs whereof, the ſaid Parties to theſe Preſent Indentures interchangeably have ſet their Hands and Seals, the Day and Year above-written.

The Confirmation of the above Indenture, by the Prior and Convent of the Cathedral Church of *Ely*.

AND We the Prior and Convent of the Cathedral Church of *Ely*, having and taking theſe preſent Indentures and all ſingular Premiſſes contained therein, freely agreed accept and approve; And the Indenture, and all the ſame Premiſſes contained and ſpecified therein, unto the ſaid Executors their Heirs and Aſſigns, for Us and our Succeſſors, ratify approve and confirm, by theſe Preſents, (Rents Conſuetudes and *all other Rights* of our Monaſtry and Priory of *Ely*, to Us and our Succeſſors, in all Things, always *ſaved and reſerved.*) In Witneſs whereof, We the ſaid Prior and Convent to theſe Preſents have ſet our Common Seal. Given in our Chapter Houſe, the fifth Day of *January* in the Year of our Lord God 1510.

EXTRACTS

‡Page 169. EXTRACTS from Biſhop *Fiſher*'s Statutes.

Statuta pro Collegio Divi Johis Evangeliſtæ infra Gimnaſium Cantabrigienſe ſito.

Preamble——

UT conſtet univerſis qui Statuta præſentia lecturi ſunt, quânam Auctoritate ſancita fuerint, hoc Frontiſpicio locandum cenſuimus Inſtrumentum quoddam Sigillis et Subſcriptionibus omnium Executorum præſtantiſſimæ Viraginis Dominæ Margaretæ Richmondiæ, Fundatricis Collegij divi Johannis Evangeliſtæ in Cantabrigia: Quo Inſtrumento per eoſdem Executores confecto, planè conſtat plenarium Auctoritatem mihi Johanni Epiſcopo Roffenſi traditam, pro condendis Legibus et Statutis, quibus tam Magiſter quam Socij et Scholares pariter et Diſcipuli teneantur obedire. Cujus quidem Inſtrumenti Tenoris eſt, qui ſequitur.

" Univerſis Chriſti fidelibus præſentes literas inſpecturis, " Ricardus Winton. Epiſcopus Carolus Somerſet Comes " Wigorniæ Thomas Lovel Miles Henricus Verney Miles " Johannes Seynt John Miles Henricus Horneby et Hugo " Aſheton Clerici, Executores Teſtamenti et ultimæ Vo- " luntatis nuper excellentiſſimæ Principiſſæ Margaretæ Co- " mitiſſæ Richmondiæ et Derbiæ, Matriſque et Aviæ duo- " rum Regum nimirum Henrici Septimi et Octavi, ſalutem " in Domino, et fidem indubiam præſentibus adhibere. " Quum ſit optandum potiùs ut non erigerentur Collegia, " quam ut erecta malè gubernarentur, nos Executores an- " tedicti, qui Sumptibus et Impenſis præfatæ Principiſſæ " Collegium Sancti Johannis in Cantabrigia extrui cu- " ravimus, ſimul et dotari, magno Affectu cupimus id ip- " ſum juſtis Legibus ſanctiſq; adminiſtrari Sanctionibus. " Verùm quoniam omnes Nos una adeſſe commodè non poſ- " ſumus, ut vel novam Electionem Sociorum in Collegio " prædicto faciamus vel Sociis ita electis Leges et Sanctio- " nes juſtas ac ſanctas exhibeamus, denique Juramentum " ab eiſdem exigamus pro Legibus homoi inviolabiliter ob- " ſervandis, Idcircô *noſtras Vices committimus* Reverendo " Patri *Johanni Roffen. Epiſcopo*, ut *ille* tàm noſtrâ quam " ſuâ Auctoritate poſſit numerum Sociorum ibidem augere " *Magiſtroq; et Sociis omnibus Statuta ſalubria noſtro Nomine* " *exhibere*, atque ab eiſdem Juramenta exigere pro eorum- " dem inviolabili Obſervatione, Recuſantes verò (ſi qui " fuerint) amovere, violantes corrigere, ac cætera omnia et " ſingula peragere quæ pro ſalubri Gubernatione ejuſdem " Collegij ſibi opportuna viſa fuerint, æquè ac ſi nos illic " omnes præſentes eſſemus: Quæ omnia et ſingula Univer- " ſitati ſignificamus per Præſentes. In quorum omnium et " ſingulorum Fidem ac Teſtimonium, Sigilla noſtra præ-

" ſentibus

" ‡ ſentibus appoſuimus. Dat. vigeſimo Die Menſis Martij ‡ P. 170.
" Anno Domini Milleſimo quingenteſimo quinto decimo."

Ad Cultum optimi maximi Dei, ad honorem divi Johannis Evangeliſtæ, ac mox ad Fidei Chriſtianæ Incrementum, *Nos Johannes Roffen. Epiſcopus*, unus Executorum ultimæ Voluntatis Nobiliſſimæ Comitiſſæ Genitricis et Aviæ duorum Regum Henrici ſeptimi pariter et octavi, *Nomine et Autoritate cæterorum Co-Executorum* ejuſdem Comitiſſæ, nempe Ricardi Wintonienſis Epiſcopi Caroli Somerſet Comitis Wigorniæ Thomæ Lovell Henrici Verney Johannis Seynt John Equitum Henrici Horneby Hugonis Aſhton Clericorum, *Leges et Statuta quæ ſequuntur* EDIDIMUS, Magiſtroq; et Sociis ac Scholaribus Collegij Divi Johannis Cantabrigiæ *tradidimus*, quatenùs eiſdem omninò ſe conforment, tam hi qui jam ſunt Magiſter Socij et Scholares, quam eorum Succeſſores quotquot futuri ſint in perpetuum.

De Electione Magiſtri.

Qd ſi tunc per † Viam Spiritus ſancti concordibus animis, † Vim. qu.
Nemine diſſidente, in quempiam ejuſmodi Virum conſenſerint, qualis in Statuto ante lecto deſcriptus eſt; aut ſi major Pars omnium ſuper aliquo ejuſmodi conſenſerit; Volumus et ſtatuimus § q'vis abſque Mora, (nullâ prorſus Licentia Patroni Ordinarij *Viſitatoris* aut alterius cujuſcunque jurisdictionem ordinariam prætendentis, nec Ceſſionis aut Reſignationis hujuſmodi eis vel eorum alicui ‡ exhibiaſne, aut ab eorum aliquo ejuſdem Approbatione expectatâ aut requiſitâ,) per Præſidentem Magiſter Collegij pronuncietur, his Verbis—

§ Qu. (forſitan, *quod is.*)

‡ Qu. vide poſt p. 182. cap. 2. Reginæ Elizabethæ, de electione magiſtri.

De juramento Magiſtri.

Ego N. in Magiſtrum Collegij Sancti Johannis Evangeliſtæ in Univerſitate Cantabrigiæ nominatus electus et præfectus Juro, tactis et inſpectis per Me his ſacro-ſanctis Evangeliis, dictum Collegium omnia Beneficia Terras Tenementa Poſſeſſiones Redditus ſpirituales et temporales Jura Libertates Privilegia et Bona quæcunq; ejuſdem nec non omnes et ſingulos Socios et Scholares et Diſcipulos ipſius Collegij, juxta Statuta et Ordinationes dicti Reverendi Patris Domini Johannis Fiſher Roffen. Epiſcopi, abſque Perſonarum Scientiarum Facultatum Generis et Patriæ acceptione quacunque, pro mea virili regam cuſtodiam dirigam et gubernabo, et per alios regi cuſtodiri dirigi et gubernari faciam; Nec ero factioſus, magis favens uni quam alii, contra Juſtitiam et Fraternitatis Amorem; nec eorum alicui Gravamina vel Moleſtias injuſtè inferam; Correctiones quoq; Punitiones

et

‡ P. 171. ‡ et Reformationes debitas juſtas rationabiles de quibuſcunq; delictis Criminibus et Exceſſibus Sociorum et Scholarium et Diſcipulorum dicti Collegij, quoties ubi et quando opus fuerit, ſecundùm Rei Qualitatem et Quantitatem omnemq; Vim formam et Effectum Ordinationum et Statutorum per dictum Reverendum Patrem editorum, abſq; Favore aut Odio Affectione Conſanguinitatis Affinitatis aut aliâ quacunq; diligenter et indifferenter faciam et procurabo: Et ſi hujuſmodi Correctiones Punitiones et Reformationes ut præfertur debite et juſte exequi non potero, propter Metum et Potentiam ſeu Multitudinem Delinquentium, ipſorum Nomina et Cognomina, cum Qualitate et Quantitate Delictorum et Exceſſuum hujuſmodi, quam citò potero, infra Menſem, *Domino Epiſcopo Elienſi qui pro tempore fuerit*, aut Domino Cancellario Univerſitatis vel ejus Vicem-gerenti, denuntiabo et revelabo, et *per eos* hujuſmodi Correctiones Punitiones et Reformationes juxta Statuta et Ordinationes Collegij in omnibus ſolerter et celeriter fieri procurabo.

Item quoties Electio vel Aſſumptio alicujus Socij ac Scholaris vel Diſcipuli in Collegium prædictum fuerit facienda, intendam et enitar ut ſolùm tales eligantur et aſſumantur quos ſecundùm Conditiones et Qualitates in Statutis dicti Collegij expreſſas habiles et idoneos reputaverim, et quos in Virtutibus et Scientiis ad Honorem et Utilitatem Collegij prædicti plus poſſe proficere et profecturos crediderim, ſine Perſonarum vel Patriæ Acceptione, Amore Favore Odio Invidia Timore Prece et Pretio poſt poſitis quibuſcunq;. Item ſi ab Officio meo amovear, aut ſi ſpontè ceſſero, Bona Collegij per Me recepta aut apud me remanentia, Præſidenti et Theſaurariis Collegij aut (Præſidente abſente) Socio maximè ſeniori in Univerſitate præſenti et dictis Theſaurariis, ſi commodè potero continuò, ſin minùs ſaltem infra quindecim Dies ex tunc prox. ſequen. ſine Contradictione ſeu Diminutione, per Inventarium inde inter me et illos, ſub Teſtimonio et Subſcriptione eorundem et meâ, reſtituam.

Item, ſi per me ſeu Occaſione meâ, aliqua Materia *Diſſenſionis* Iræ vel Diſcordiæ in dicto Collegio (quod abſit) *ſuſcitata fuerit*, et per Præſidentem Decanos vel Theſaurarios et duos alios ex ſeptem Collegij Senioribus finis rationabilis ſeu placabilis infra quinq; Dies factus non fuerit, tunc *Cancellarii Univerſitatis* Cantabrigiæ qui pro Tempore fuerit, *præpoſitique Collegii regalis*, ac *Magiſtri Collegij Chriſti* in eadem Univerſitate, ſi tunc infra eandem præſentes fuerint, ac dicto Cancellario præpoſito aut Magiſtro extra Univerſitatem Agentibus, abſentis aut abſentium Vices Univerſitate gerentium, unâ cum totidem ex prænominatis quot in Univerſitate præſentes fuerint, *Ordinationi Arbitrio Decreto et Auctoritati* perſonaliter et effectualiter me ſubmittam: Et quicquid duo ex illis pro tempore, ſecundùm Formam infra limitatam

pro

‡ pro tempore conſulti, arbitrati fuerint ſtatuerint ordinaverint vel diſſinierint in eâ Parte, id omne fideliter obſervabo et iiſdem cum effectu parebo, ſine Contradictione quacunque, ceſſantibus Provocationibus Appellationibus Querelis Exceptionibus et aliis Juris et Facti Remediis quibuſcunq;, quibus omnibus et ſingulis in Vim pacti renuncio in his Scriptis. ‡ Page 172.

Item, omnia et ſingula Statuta et Ordinationes dicti Collegij per dictum Reverendum Patrem Dominum Johannem Roffen. Epiſcopum, Executorem ultimæ Voluntatis Dominæ Margaretæ Comitiſſæ Richmondiæ et Derbiæ, edita, et per eum dum Superſtes fuerit endenda, quantum me concernunt, ſecundùm literalem et grammaticalem Senſum et Intellectum inviolabiliter tenebo exequar et obſervabo, et quantum in me fuerit faciam ab aliis obſervari.

Itemque *nulla Statuta ſeu Ordinationes* Interpretationes Mutationes Injunctiones Declarationes aut Expoſitiones vel Gloſſas aliquas, præſentibus Ordinationibus et Statutis vel qualitercunq; vero Senſui et Intellectui eorundem repugnantes vel repugnantia derogantes vel derogantia contrarias vel contraria, per quemcunq; ſeu quoſcunq; alium vel alios *quam per* Reverendum Patrem Dominū Johannem Roffen. Epiſcopum prædictum faciendas vel facienda, quomodo libet ſcienter *acceptabo*, vel ad ea *conſentiam*, aut ipſa aliqualiter *admittam*, nec eiſdem *parebo* ullo tempore, vel *intendam*, nec illis vel illorum aliquo ullo Modo *utar* in Collegio prædicto vel extra, tacitè vel expreſſe; ſed eîs et eorum cuilibet *contradicam* et etiam *reſiſtam* expreſſe, ipſaq; fieri viis et modis omnibus quibus potero *obſtabo et impedam*.

Item, Juroque, quantum in Me fuerit et quatenùs meam perſonam concernat aut concernere poterit, me laudatas ac probas hujus Collegij Conſuetudines *obſervaturum*, unà cum aliis Ordinationibus per Magiſtram et Socios ac Scholares editis pro Suſtentatione quorundam Sociorum ac Diſcipulorum, juxta Tenorem cujuſdam Juramenti quo Magiſter olim et Socij ſe devinxerunt *oraturos* tam pro dicto Domino Johanne Roffen. Epiſcopo quam Henrico Ediall Archidiacano Roffen. Hugone Aſhton Archidiacano Eboracenſi Johanne Ripplyngham in ſacrâ Theologia Doctore et Roberto Dokket in eadem Baccalaureo ac Marmaduco Conſtable Equité aurato et Roberto Symſon in Artibus Magiſtro cæteriſq; qui privatas aliquas aut Sociorum aut Diſcipulorum fundationes fecerint aut in poſterum facturi ſint; ſimulq; et curabo, quantum in me fuerit, à cæteris omnibus tam Sociis quam Diſcipulis idem fieri; neque extortas eorundem Interpretationes (per quemcunque factas) admittam, aliter quam Senſus eorum apertus patitur et mea Conſcientia magis conformem indicabit *animo Conditoris*.

De

† Page 173. De Sociorum Qualitatibus.

Nunc itidem et Leges dabimus reſiduo Corpori; quod nimirum ex Sociis, quocunq; numero eos fore contigerit, tanquam ex potioribus et ſolidioribus Membris, volumus integrari. Pro Fundatrice verò, tametſi Rex illuſtriſſimus, in Carta Licentiæ ſuæ quam Aviæ ſuæ, Dominæ Fundatrici, conceſſit, mentionem fecerit de quinquaginta Sociis ac Scholaribus, Nos tamen, qui ob Subtractionem reddituum Annuorum ad Valorem quadrigentarum Librarum, ipſum numerum implere non poſſumus, quantum ad præſentem Ordinationem ſpectat (ſi fieri poteſt) octo ſuper viginti deputari volumus et ordinamus.

De Sociorum Electione, ac ipſius Circumſtantiis.

Et quò poſſit exactior fieri Sociorum Delectus, convocari volumus et ſtatuimus, per Magiſtrum vel (ipſo abſente) Præſidentem, cunctos Socios in Univerſitate præſentes, primo Die Lunæ cujuſq; Quadrageſimæ, ſimul et commonefieri " quatenùs quiſq; ſolitam Inquiſitionem faciat de Juvenibus " quibuſdam, tàm Moribus quàm Eruditione magis idoneis, " qui in Sociorum numerum cooptentur; et ut repertorum " Nomina, ſimul cum Nomine Comitatûs quo quiſq; fuit " oriundus, in Scedula conſcribatur, unà cum aliis Dotibus " quibus ipſe Juvenis fuerit præditus;" Ad quam Inquiſitionem teneri ſingulos volumus, in Vim Juramenti ſui: Cujus autem Nomenclatura non ante ſeptem Dies Electionis futuræ, tradita magiſtro fuerit aut ejus Vice-gerenti quando Magiſter aberit, hunc, pro eâ Vice, ineligibilem Pronunciamus. Porrò, Delectum hunc, quoties eveniet, celebrari volumus et ordinamus quâq; Die Lunæ quæ proxime ſequitur Dominicam Paſſionis: Quo Die Magiſter et Socij cuncti præſentes conveniant in Sacellum, quum Horologium inſonuerit octavam; et illic, primùm lecto Statuto de Cooptandorum Qualitatibus, Magiſter primùm, deinde reliqui per Ordinem Socii, jusjurandum quod ſequitur, tactis Sacris Evangeliis, præſtabunt. " Ego N. N. Deum teſtor et hæc ſancta ipſius " Evangelia, me neminem in Socium hujus Collegij electu- " rum, *niſi quem* juxta Statutum antelectum me *Conſcientia* " *magis idoneum indicabit*; neq; iſtud faciam Pretio vel " Mercede quâvis, à quopiam aut datâ aut expectatâ." Juratis itaq; ſingulis, fiat è veſtigio Scrutinium, per Magiſtrum et duos è Sociis maximè Senioribus, (ſic tamen ut hi non fuerint de Numero Septem Seniorum conſcriptorum,) qui priùs etiam tactis ſanctis Dei Evangeliis promittant " ſe " veraciter et abſq; dolo Scrutinium ipſum pro futura So-

" ciorum

* " ciorum Electione tractaturos, et secretum penitùs habitu- * P. 174.
" ros, neq; Signo aut Nutû aut alio quovis pacto rem in-
" dicaturos." Auditis ergò singulorum Votis et Suffragiis, illum vel illos in Socium vel Socios dicti Collegij Magister pronunciabit, in quem vel in quos ipse Magister, cum majori aut æquali parte Sociorum, consenserit. Et si Magister, cum majori aut æquali parte Sociorum, in aliquem aut aliquos eligendum vel eligendos haudquaque convenerint, sed in eâ Dissensione triduum ab incepto Delectu perseveraverint, tùm Volumus ut hujus Negotij diffinitio, pro hac Vice, ad septem conscriptos Seniores referatur: itaque pro his de quibus non est consensus factus, Electio septem illis Senioribus deferenda sit, ad hunc Modum ut sequitur. Quarto igitur Die post inchoatam Electionem conveniant interùm omnes in Sacellum, et primitùs et septem ipsos Seniores Juramento præstito " quòd illum vel illos, de quibus fit dissidium, " in Socium vel Socios cooptabunt, qui suis Conscientiis " magis videbitur aut videbunter idonei;" Præstito igitur hoc Juramento, fiat alterum iteratò Scrutinium, in quo Magister et duo prædicti Scrutatores Suffragia Septem illorum Seniorum scrutabuntur: et is vel ij in quem vel quos major Septem Seniorum Pars consenserit, pro electo vel electis habeantur: atq; ita à cæteris acceptentur. Quòd si forte Conscientiis eorum septem Seniorum non videatur inter eligendos aliqua Disparitas, aut forsitan inter se major eorum Pars haudquaquàm consenserit, tum Volumus is vel ij qui a Magistro priùs nominatus aut nominati fuerant, pro Socio vel Sociis protinùs declarabitur aut declarabuntur. Proviso ut neque in hac Electione neq; aliâ quacunq; cujuscunq; Personæ infra dictum Collegium faciendâ, § suam Vocem aut Suffragium alterius Personæ cujuscunq; Arbitrio et Dispositioni quovis Modo committat, aut incertam Personam aut pro incerto Comitatu vel Diocesi sub disjunctione vel Conditione quovis Modo nominet aut eligat: contra faciens, et Suffragium deinde suum et etiam dicti Collegij Societatem, ipso Facto, ex tunc imperpetuum amittat. Nec liceat, sub pœna Perjurij, cuique ex illis Scrutatoribus, nomina aliorum eligentium, alii cuipiam, quovis modo per se vel per interpositam Personam Nutu Verbo Signo vel Scripto, ante completam et publicatam Socij Electionem, offendere.

§ Here is an omission of the nominative case to committat; viz. " Aliquis Socius," or " Aliquis ex " Electoribus."

De Morum Honestate servandâ, et Dissentionibus sedandis.

Quod si inter Magistrum et alium aut alios hujus Collegii Socios, aut illius Causa, aliqua Materia Dissensionis Iræ Rixæ vel Discordiæ in dicto Collegio suscitata fuerit, et per Magistrum Decanos et majorem partem Septem Seniorum Finis rationabilis seu placabilis infra octo Dies proximè sequentes factus non fuerit, tunc Volumus ut Partes dissentientes,

*P. 175. *tes, Virtute Juramenti ſui, triduum poſt illius octo Dies duos Socios eligant, qui electi, in ſui Virtute Juramenti, infra biduum poſt eorum ad hoc Electionem et deputationem, *Præfectum Collegij Regalis, et Magiſtrum Collegij Chriſti, et Magiſtrum ſive Cuſtodem Collegij divi Michaelis*, aut dictis Præfecto Magiſtro et Cuſtode vel eorum aliquo extra Univerſitate agentibus, tunc eorum Vices Abſentium in dictis Officiis infra Univerſitatem gerentes, ac etiam reliquos prænominatos ſiqui fuerint in Univerſitate præſentes, adeant; et eiſdem hujuſmodi Diſſenſionis Cauſam ſive Materiam, in Scriptis ſignificent et referant: Et quicquid *duo ex illis*, pro tempore conſulti, *arbitrati fuerint et decreverint*, illi omnes *pareant* et in ſui Virtute Juramenti *obediant*.

De Modo procedendi contra Magiſtrum &c.

His Ordine diſpoſitis, ad errata quæ accedere poſſunt pervenimus, adhibituri quæ poterimus Remedia, incipientes à Magiſtro ut Duce et Principe, quo bono et provido ut nihil et utilius, ita imprudenti inepto indigno criminoſo nihil eſt deteſtabilius. Qua circa ſtatuimus ut Magiſter quicunq; propter Terrarum Tenementorum Reddituum Poſſeſſionum ſpiritualium ſeu temporalium ſua Culpa Diminutionem ſeu Alienationem, vel propter Detractionem Oblationum Alienationem illicitam Bonorum et Rerum ipſius Collegij infamiam incontinentiamq; notabilem Negligentiam intolerabilem Homicidium voluntarium aliamve Cauſam enormem ipſum Magiſtrum omninò reddentem criminaliter irregularem vel aliter inhabilem, nec non propter infirmitatem infectivam et contagioſam perpetuam, cujus occaſione non poterit abſque Scandalo hujuſmodi Officium exercere, ab eo penitùs amoveatur: Ad cujus Amotionem hoc modo procedatur; videlicet, ut ſtatim, vel ſaltem infra quindecim dies poſtq; aliquod Præmiſſorum commiſerit vel in eorum aliquod inciderit, primo per Præſidentem, aſſiſtentibus ei aliis duobus Officiariis Clavigeris et quatuor aliis Sociis ex Septem Senioribus dicti Collegij, vel ſaltem cum Aſſenſu et Aſſiſtentia duarum tertiarum Partium omnium Sociorum dicti Collegij (ſic quòd inter eos ſint quatuor Seniores ex Septem electi,) vel, Præſidente nolente aut negligente, per Decanum Theologiæ cum prædictorum Aſſiſtentia, moveatur Magiſter ut ſuadeatur ad voluntariè recedendum ab Officio. Quod ſi ſponte infra triduum cedere noluerit, tunc infra octo Dies poſt hujuſmodi Monitionem, Præſidens, Aſſenſu et Teſtimonio omnium Sociorum dicti Collegij, vel ſaltem omnium prædictorum modo aliquo prædicto ſibi in Magiſtri Monitione Aſſiſtentium, vel, ipſo nolente aut negligente, dictus Decanus Theologiæ, cum Aſſenſu et Teſtimonio prædictorum, DENUNCIABIT *Domino* EPISCOPO ELIENSI, aut, eo in remotis agente, *Vicario* in Spiritualibus generali, ſeu

* ſeu (Sede vacante) *Cuſtodi* in Spiritualibus, EJUSDEM, per duos aut tres Socios ipſius Collegij Seniores, cum literis aliquo Sigillo authentico ac Signo et Subſcriptione alicujus Notarij publici ſignatis, vel ſaltem loco Sigilli authentici Subſcriptione dicti Præſidentis vel Theologiæ Decani et prædictorum Aſſiſtentium ac Notarij Publici Signo communitis, Cauſas Defectus Crimina Exceſſus vel Enormia Magiſtri continentibus. Proviſo quòd omnes hujuſmodi Aſſiſtentes et Teſtimonium perhibentes, priùs tactis ſacro ſanctis Dei Evangeliis, coram Præſidente aut Decano Theologiæ, ipſo primùm id coram eis præſtante ac deinde à ſingulis illorum exigente, jurabunt " quòd non per Invidiam Malitiam Odium " vel Timorem ipſius Magiſtri, Amorem vel Honorem ali- " cujus promovendi ad illud Officium, nec per Conſpirati- " onem Æmulorum & Confœderationem, nec per Procu- " rationem alicujus vel aliquorum, nec Prece aut Pre- " tio aut alio quocunq; Modo illicito inducti, ſed pro " bono Zelo et Utilitate prædicti Collegij et pro utiliori et " convenientiori Regimine ejuſdem et Honore, Teſtimoni- " um illud perhibuiſſe." EPISCOPUS VERO ELIENSIS, vel, ipſo in remotis agente, SUUS VICARIUS in Spiritualibus Generalis, aut (Sede Elienſi vacante) CUSTOS SPIRITUALITATIS EJUSDEM, de Cauſis criminoſis Criminibus Exceſſibus et Defectibus contra Dictum Magiſtrum expoſitis, SUMMARIE *et de plano et* EXTRA JUDICIALITER COGNOSCAT: et ſi, per Informationes ſufficientes miniſtratas, hujuſmodi ſuggeſta quæ ad dicti Magiſtri amotionem ſufficere debeant, *recipiat eſſe* VERA, ſtatim, aut ſaltem infra triduum proximè ſequuturum, *ipſum* AB OFFICIO *ſuo et ab* ADMINISTRATIONE *ſua* AMOVEAT *ſine ulteriori Dilatione*; dicti quoq; Collegij Sociis DENUNCIET *et* INJUNGAT *ut ad Electionem novi Magiſtri liberè procedere valeant & debeant*, juxta Formam in Statuto ſuperiùs expreſſam; CESSANTIBUS APPELATIONIS RECUSATIONIS QUERELÆ AUT CUJUSCUNQUE ALTERIUS *Juris aut Facti* REMEDIIS, *quibus hujuſmodi* AMOTIO VALEAT IMPEDIRI AUT DIFFERRI; *quæ omnia* IRRITA *eſſe, volumus ſtatuimus et decernimus.* * P. 176.

De Modo procedendi contra Socios Scholares et Diſcipulos, in majoribus Criminibus.

—At Præmiſſa, vel eorum aliquod in præſenti Statuto contentorum, coram Magiſtro aſſiſtentibus et Præſidentibus Decanis et Theſaurariis, vel ſaltem uno Decano Theſaurario et aliis quatuor ex Septem Senioribus, publicè confeſſus fuerit, vel per Teſtes idoneos prædictorum Judicio comprobandos, aut per Facti coram eis evidentiam, manifeſtè reus eorum Judicio et Sententia convictus fuerit; eum ſtatim à dicto Collegio, præſentis Vigore Statuti, nullâ aliâ Monitione Præmiſſâ excluſum et privatum fore ipſo facto decernibus, abſq; cujuſcunq, Appellationis vel Querelæ Remedio.

* P. 177. De ambiguis et obſcurius interpretandis.

Diſtribuiſſe igitur jam univerſis Collegij Membris Officia ſimul et Officiorum Leges nobis videmur, et exactè quidem: quæ ſi ſerventur ad amuſſim et inviolatè, (quod utiq; vehementer optamus) ex eodem viros haud dubiè ſperamus prodituros, qui magnæ tùm Utilitati tùm Honori non ſolùm huic Collegio, verùm etiam toti Regno futuri ſint. Proviſum etiam eſt, quoad fieri poteſt per uniuscujuſq; Juramentum, quo nihil apud Chriſtianos firmius aut antiquius haberi debet, ut Statuta hæc per Nos jam tradita et Auctoritate Sedis Apoſtolicæ corroborata, exactiſſimè ſerventur à ſingulis, quatenùs unumquemque concernant. Cæterùm quia mihi Johanni Roſſenſi, per quem hæc edita ſunt, tàm à Summo Pontifice Julio ſecundo, quàm a Fundatrice cæteriſq; omnibus Co-Executoribus, Auctoritas eſt tributa non ſolùm condendi Statuta quæ mihi viderentur huic Collegio conducibilia, verùm etiam Magiſtro ſimul et Sociis eadem exhibendi, Juramentaq; à ſingulis tam Sociis quam Diſcipulis pro illorum inviolabili Obſervatione diſtrictiùs exigendi, ſed et cætera cuncta peragendi quæcunq; pro ſalubri Collegij hujus Moderamine mihi viſa fuerint opportuna, atq; id tam efficaciter quam ſi cuncti ſimul hic eſſemus Præſentes; Ego igitur, horum omnium pariter et meo ipſius nomine, caſſatis aliis quibuſvis Statutis prius excogitatis, quatenùs præſentibus adverſantur, hæc præſentia ſeu vera et Salubria pronuncio: Quibus obſervandis, tàm Magiſtrum quàm Socios et Diſcipulos adſtringi volo; reſervatâ mihi nihilominus Poteſtate quoad vixero; vel adjiciendi vel minuendi ſeu reformandi interpretandi declarandi mutandi derogandi tollendi diſpenſandi novaq; rurſum alia (ſi licebit) ſtatuendi ſimul et edendi, non obſtantibus his Statutis factis et Juramento firmati; Cæteris autem omnibus, cujuſvis Dignitatis Auctoritatis Statûs Gradûs aut Conditionis exiſtant, ac Magiſtro quoq; et Scholaribus tam Sociis quam Diſcipulis omnibus hujus Collegij, prorſus inhibens ne cum aliquo dictorum Statutorum diſpenſent, aut quævis nova Statuta ſive pro Collegio ſeu pro quovis ejuſdem Membro, quæ dictorum Statutorum alicui repugnabunt, condant aut decernant. Quod ſi fortè Cancellarius aut Vice Cancellarius *aut Reverendus Pater* Eliensis Episcopus aut demùm quivis alius contrarium attemptaverit, et *novum aliquod Statutum aliud à prædictis* adhibere molitus fuerit, ab ejus Obligatione, per hanc Autoritatem ab Executoribus aliis mihi commiſſam, Magiſtrun et cæteros omnes tam Socios quam Diſcipulos penitûs abſolvo, eiſque omnibus et ſingulis interdico ne cuivis hujuſmodi Statuto aut Ordinationi pareant admittantive quovis Pacto, ſub Pœna Perjurii atq; etiam Amotionis perpetuæ à dicto Collegio ipſo Facto. Cæterûm quia Nihil eſt uſq; adèo luculentum quod

non

* non à Captioſis verti poterit in Queſtionem, ob eam Rem volumus quòd ſi quicquam in aliquo Statutorum prædictorum aut Obſcuritatis aut Ambiguitatis Magiſtro et Majori Parti Sociorum occurrat quoad nos vixerimus, eorum ſingulos in Chriſti Viſceribus obteſtamur ut ea dubia nobis proponant quoties oriuntur, quemadmodum et hactenus fecerunt; noſq; libenter (ut et ante non ſemel fecimus) illorum dubiorum Obſcuritatem excutiemus: Quòd ſi poſtquam Nos ab hac Luce migraverimus, novi quidem Scrupuli reperti fuerint aut de novo ſuſcitati, volumus et Ordinamus, ut rectus et laudabilis Statutorum Uſus interea juxta Mentem noſtram obſervatus, et qui maximè congruat Inſtituto Pientiſſimæ Fundatricis, ſit Magiſtro pariter et Sociis Norma quædam et Regula quam cum Puritate Conſcientiarum ſuarum ſequantur in ejuſmodi Scrupulis et Ambiguitatibus omnibus. Neque tamen per hoc intendimus, ut ſi præter Notitiam noſtram quiſpiam abuſus in Statutis ipſis, aut in quavis eorundem Parte, per Magiſtrum aut Officiarios aut quemlibet cæterorum in Curſu fuerit, quod is pro recto et laudabili Statutorum Uſu recipiatur; aut ſi nos cum ipſo Magiſtro qui nunc eſt, aut cum alio quovis Sociorum, in ulla Statutorum Parte, diſpenſaverimus, Nolumus tamen ut hoc Privilegium, uni aut alteri ex cauſis nos moventibus conceſſum, pro communi quadam Licentia teneatur: Sed et cunctos oramus et per Chriſti Vulnera precamur, ut Juramentorum ſuorum meminerint, atq; noſtram Mentem in ipſis Statutis reſpiciant, magis quàm aliquem qui præter Aſſenſum noſtrum clam irrepſit corundem Statutorum Abuſum; Nam omninò prohibemus, ne par aliquam Declarationem aut Conſuetudinem ullam aut diuturnum quamlibet Abuſum vel demum Actum aliquem, Verbis aut Intentioni dictorum Statutorum in aliquo derogetur. VISITATIONEM *autem hujus Collegij Reverendis in Chriſto Patribus* EPISCOPIS ELIENSIBUS COMMENDAMUS: Quibus et conceſſimus cujuſdam idonei Præſentationem, qui ſit futurus in hoc Collegio Socius. Idoneum autem intelligimus, qui Qualitates habeat eas quæ deſcribuntur in Statuto de Qualitate Sociorum: Neq; enim alium quempiam recipi Volumus à Collegio. Eoſdem etiam oramus et per Dominum Jeſum obſecramus, ne quenquam præſentent nihi talem qui pro ſuis Meritis hoc Sodalitio dignus fuerit, et cui cum Statutis per omnia conveniat. * P. 178.

De Viſitatore.

Nihil adeò bonis Legibus firmari muniriq; poteſt, quin ab iis qui licenter vivere et Luxui Libidiniq; Fræna laxare ſtudent, aliquo Fraudis Commento facile queat eludi. Nos igitur Fiducia Benignitatis Reverendiſſimorum Patrum *Epiſcoporum Elienſium* freti, et cum primis amantiſſimi Domini Dni Nicolai Weſt qui Sedem Epiſcopalem jam ſuis Meritis obtinet, nempe quòd tam ipſe quàm Succeſſores

* P. 179. * ceſſores ejus, pro Zelo quem ergà rem publicam Chriſtianam gerunt, *nullis futuris Temporibus* PATIENTUR hæc Statuta contra noſtrum Mentem et contra ſanctiſſimum Pientiſſimæ Fundatricis Inſtitutum violari, ſtatuimus ordinamus et volumus, et quod *Epiſcopo cuivis Elienſi qui pro Tempore fuerit,* QUOTIES *per Magiſtrum et Præſidentem Decanoſq; et Theſaurarios, ſive per Magiſtrum et quatuor è ſeptem Senioribus deputatis, ſive per quinq; ex eiſdem Senioribus reluctante Magiſtro aut Præſidente, ſeu per duas tertias Sociorum Partes, requiſitus fuerit, ſed et* CITRA *quamvis Requiſitionem,* DE TRIENNIO IN TRIENNIUM *ſemel ad Collegium accedere liceat* per Se, vel per Commiſſarium ſuum Specialem quem duxerit deputandum, præterquam per Cancellarium Univerſitatis Cantabrigiæ ſeu Cancellarium aut Procuratores Univerſitatis ejuſdem, et præterquam per alios qui ex dicto Collegium pro aliquo Crimine aut Delicto amoti ſint aut Amotionem hujuſmodi fugientes receſſerunt, ac præterquam per Magiſtrum aut aliquam aliam Perſonam dicti Collegij aut alios quoſcunq; in Univerſitate per unam quindenam anno proximo eam Viſitationem præcedenti Studentes, et præterquam per religioſos quoſleſcunq; prædictorumve antiquem aut Conſanguineum alicujus Socij dicti Collegij; *liceat* inquam, *ad ejus* VISITATIONEM *liberè accedere, Magiſtrumq; ac alios ſingulos Socios Scholares ac Diſcipulos ejuſdem Collegij in Sacellum ejuſdem* CONVOCARE: *Cui quidem Reverendo Patri* aut ejus Commiſſario, Vigore Præſentis Statuti, PLENAM CONCEDIMUS POTESTATEM, *ut ſuper omnibus et ſingulis Particulis et Articulis in noſtris Statutis contentis, ac de quibuſcunq; Articulis Statum Commodum aut Honorem dicti Collegij concernentibus, aut quæ in dicto Collegio aut aliquâ illius perſona fuerint reformanda aut corrigenda,* præterquam de Secretis et Occultis, Magiſtrum Socios Scholares et Diſcipulos, *interroget et inquirat,* COGATQUE *eorum unumquemq; in Virtute Juramenti,* ET PER *Cenſuras* ſi Opus fuerit, ad dicend. Veritatem de Præmiſſis omnibus et ſingulis, præterquam (ut prædictum eſt) de ſecretis et occultis; exceſſuſq; ac negligentias crimina et delicta quorumcunque dicti Collegij, qualitercunq; commiſſa, in eâ Viſitatione comperta, *ſecundùm Exceſſûs Exigentiam et Criminis aut Delicti Qualitatem debitè* PUNIAT *et* REFORMET: CÆTERAQUE OMNIA ET SINGULA FACIAT ET EXERCEAT *quæ ad eorum Correctionem et Reformationem ſint neceſſaria aut quoviſmodo opportuna, etiam ſi ad* PRIVATIONEM *aut* AMOTIONEM *Magiſtri aut Præſidentis aut alterius cujuſcunq; ab Adminiſtratione ſuâ vel Officio, ſeu ſi ad Amotionem alicujus Socij Scholaris vel Diſcipuli ab eo Collegio,* ſi tamen hoc ipſum Statuta et Ordinationes exigent, procedere contingat. Quos quidem Magiſtrum Socios et Scholares Diſcipulos, ac præterea Miniſtros quoſcunq; etiam Famulos, prædicto Domino Epiſcopo et ejus Commiſſario, quoad omnia et ſingula Præmiſſa,

miſſa, volumus et præcipimus effectualiter intendere et parere ; Statuentes inſuper, ut nullus in *Viſitationibus prædictus* ſeu aliis Scrutiniis faciendis in dicto Collegio, contra *Magiſtrum aut aliquem alium ipſus Collegij quicqm dicat* P. 180. deponat ſeu denunciet, niſi quod verum crediderit, ſeu de quo publico Vox et Fama laboraverit contra eundem, in Virtute Juramenti ab eis Collegio præſtiti ; Ordinantes præterea quod Dominus *Epiſcopus Elienſis cùm in Perſonâ propriâ viſitare et præmiſſa facere dignetur*, Magiſter et Theſaurarij unicam ei intra Collegium Refectionem faciant ; ſi verò per Commiſſarium Epiſcopus viſitaverit, Commiſſario duæ Refectiones intra Collegium exhibeantur : Quibus tam Reverendum ipſum Patrem qm ejus Commiſſarium oramus ut contenti ſint. Cæterùm inceptam aliquam Viſitationem ultra duos Dies proxime ſequentes, aut ex Cauſis urgentiſſimis et rariſſimis ultra quinq ; Dies, prorogari aut continuri nullo Pacto volumus : Sed lapſo et exacto illo triduo, et quando ex Cauſis prædictis ulterius prorogatur ſexto die tranſacto, eo ipſo Viſitatio illa pro terminatâ et diſſolutâ habeatur. Et ſi quæ in ea Parte compererit corrigenda et reformanda, quæ Brevitate Temporis corrigere et reformare, non potuerit, ea Magiſtro in Scriptis tradat : Qui ea omnia, ſecundum Formam et Exigentium Statutorum quam primùm corrigere et reformare, in Virtute Juramenti et ſub Pœna Privationis ab Officio ſuo ipſo facto, teneatur. Prædictorum quoq ; Reverendorum Patrum Elienſium Epiſcoporum et Commiſſariorum ſuorum quorumcunq ; Conſcientias, apud altiſſimum (quantum poſſumus) graviùs oneramus, ac in Viſceribus Domini noſtri Jeſu Chriſti hortamur et obſecramus, ut in faciendo et exequendo Præmiſſa, ſecundùm Apoſtoli Doctrinam " non quærant quæ ſuo ſunt ſed quæ Jeſu Chriſti," ſolumq ; Deum habentes præ Oculis Mentis, Favore Timore Odio Prece et Pretio Coloribus Occaſionibus poſt poſitis quibuſcunq; Inquiſitionis Correctionis et Reformationis Officium diligenter impendant et fideliter in omnibus exequantur, ſicut coram Deo in ejus extremo Judicio in hoc Caſu voluerint reddere Rationem ; Statuentes præterea ut Magiſter Socius Scholaris aut alius quiſpiam hujus Collegij, ſuper Exceſſibus vel Delictis, *in Viſitationibus et Inquiſitionibus per dictum Reverendum Patrem vel ejus Commiſſarium ut præmittitur faciendis*, accuſatus vel detectus, copiam compertorum vel detectorum hujuſmodi ſibi tradi dedi dari oſtendi, ac Nomina detegentium, vel denunciantium ſibi exponi aut declarari, nullo Modo petat ; neq; ipſa comperta et detecta, aut Nomina detegentium, tradantur eidem aut oſtendantur ; ſed ſuper eiſdem compertis et defectis, *ſtatim coram ipſo Domino Epiſcopo vel ejus Commiſſario perſonaliter reſpondeat, ac Correctionem debitam ſubeat pro eiſdem*, ſecùndum noſtrarum Ordinationum et Statutorum Exigentiam et Tenorem, *ceſſantibus quibuſcunq; Provocationibus Appellationibus Querelis*

lis et aliis Juris et Facti Remediis, per quæ ipsius Correctio et Punitio differri valeat seu alias quovismodo impediri, Si tamen ad *Privationem* aut *Inhabilitatem* Magistri aut *Expulsionem* Socij aut Scholaris per Episcopus aut ejus Commissa-
* P. 181. rium agatur, *tunc ostentatur* ei detecta : Quæ si non poterit* rationabiliter et probabiliter evitare, et justâ Defensione propulsare, *amoveatur sine Appellatione aut ulteriori Remedio* ; dummodò ad ejus Expulsionem concurrat consensus quatuor è septem deputatis Senioribus tunc in Universitate præsentibus ; *sine quorum Consensu* irritata sit hujusmodi Expulsio, et nulla ipso facto. Et insuper, si contra Magistrum, ad Amotionem ab Officio, per hujusmodi Domini Episcopi Commissarium, etiam consentientibus ut præfertur quatuor illis Senioribus, procedatur, non negamus ei omnes Querelas et Defensiones justas et honestas *apud ipsum Dominum Episcopum Eliensem, dummodo ulteriùs non appellet* ; non obstante nostrâ Ordinatione prædictâ, aut aliis quibuscunq; PRÆTER HUNC *Visitationis Modum, nos* ALIUM NULLUM *Eliensibus Episcopis concedimus* ; sed nec a Sociis tolerari permittimus, aliquo Pacto : Quod etiam eis mandamus, in Vim Juramenti sui. Scimus enim quòd eximia virago Domina Fundatrix, dum in humanis egit, *impetravit ab Elienſi Episcopo qui tunc fuerat, Jus Fundationis, eâ quidem Ratione ut* ex desolatis Ædiculis tam illustre Collegium erigerit : Quod
† V. post. 195, 196, 202. *Elienses Episcopi* NIHILO † MAJOREM *in hoc Collegio sibi vindicent Autoritatem quàm in* CÆTERIS *Academiæ Collegiis ubi non sunt Fundatores.* His itaq; dictis Legibus, quas tùm salubres tùm justas existimamus, Magistrum et Scholares omnes tam Socios quam Discipulos Collegij divi Johannis in Cantabrigia, regi volumus et gubernari : Quibus si sese diligenter attemperent, nihil dubitamus quin afflatus aderit divini Spiritûs, qui rectà perducet obsequentes & magnum Eruditionem cum pari conjunctâ Sanctimoniâ. Neque enim fas est ambigere, quin facet ille Spiritus qui in quâvis Congregatione Christianorum residet, præsto sit adjutorius cunctos qui cum Fide et purâ Conscientiâ conversari conantur, justisq; et salubrius Monitis obtemperant ; præcipuè tamen eos qui Studio sacrarum Literarum insudant. Nam ob has potissimùm referandas ille missus foit : " Quam," inquit, " Venerit " ille qui est Spiritus Veritatis, ducet vos in omnem Veritatem." At *quos* ducet ? Nimirùm *humiles* et *obsequentes*. Super hujusmodi requiescit, fovens eos, et indicibilibus eos, Consolationibus reficiens : Sed et istis quum sit ostiarius, aperit ac referat Arcana Scripturarum. Nihil igitur vobis hæsitandum est, Fratres, quin si studueritis has Leges observare, pariter et unanimes in Charitate jugiter conservari, Patri nostro complacitum erit suo vos tandem afflare Spiritu : Quod ut faciat, ipse, tametsi Peccator sim, assiduè precabor ; et vos vicissim, quæso, pro me precemini.

De

* De quatuor Sociis et duobus Diſcipulis per Johannem Roffenſem Epiſcopum fundatis. * P. 182.

Quinetiam decerno quòd ad Exercitamenta Scholaſtica, et ad ea quæ per Statuta Collegij cæteri Socii perimple e tenentur, ſimiliter obſtringantur; et ad ea perimplenda, pariter et ad has meas Ordinationes fideliter obſervandas, protinùs ut electi fuerint, Juramentum præſtent corporale, et cætera faciant quæ ad hunc Effectum exiguntur; et ſi deliquerint, ſimili modo per omnia ſubjaceant Correctioni: Et idem etiam quantum ad duos illos Diſcipulos attinet, fiat, juxta Modum et Formam quâ cæteri tractantur Diſcipuli. Poſtremò volo quod ad has meas Ordinationes citra Fraudem obſervandas, tàm Magiſter quam cæteri Socij, mox ut electi fuerint, Jurejùrando ſint obſtricti; ne forte per Negligentiam et Incuriam ſuam, ob Indenturarum inter nos confectarum Violationem, Collegio gravis inferatur Jactura.

EXTRACTS from Queen Elizabeth's Statutes.

Preamble——

Elizabetha Dei Gratia.

Itamq; *multis ſuperioribus Statutis abrogatis, multis mutatis et emendatis, nonnulliſq; novis additis, hæc.* Authoritate noſtrâ, inviolabiliter ab omnibus qui in hoc Collegio commorantur et commoraturi ſunt, cuſtodiri et obſervari volumus, quem ad modum uniuſcujuſq; Officium in Statutis ſequentibus deſcriptum deſignarumq; fuerit; * reſervat. ſemper nobis et Succeſſoribus noſtris &c.

* Note. This Clauſe of Reſervation is not complete, in the Original; but it is more fully expreſſed in the 50th Chapter.

Chap. 2d. De Electione Magiſtri.

Quod ſi tunc per * viam Spiritûs ſancti concordibus animis, nemine diſſentiente, in unum quempiam ejuſmodi Virum conſenſerint, qualis in Statuto antelato deſcriptus eſt; Aut ſi major Pars Præſentium ſuper uno aliquo hujuſmodi conſenſerint; Volumus et Statuimus abſq; morâ (nullâ prorſus Licentia Ordinarij Viſitatoris aut alterius cujuſcunque Juriſdictionem ordinariam prætendentis expectatâ) Magiſter Collegij pronuncietur: Quòd ſi quinque illorum de uno aliquo

* Vim, forſitan;) v. ante, pa. 170.

* P. 183. * aliquo non consenserint, tum *ad* COLLEGII VISITATOREM *veniatur*; et ille pro Magistro habeatur, *quem solus* VISITATOR *duxerit præficiendum*, modò is Statuto de Qualitate et Officio Magistri in omnibus respondeat.

CHAP. 11th. De Electione Præsidis.

Quòd si post tria aperta Scrutinia, ipse Magister cum quatuor de uno non convenerint, tùm is electus erit in quem ipse Magister cum tribus maximè Senioribus, ex dictis octo Senioribus Sociis Domi præsentibus aut majori eorundem Parte, consenserint. Quod si ne ii quidem ante horam tertiam ejusdem Diei de uno cooptando (ut dictum est) concordare possint, omnes tamen octo Seniores vel septem ex his de uno eligendo unanimiter consenserint, eo Casu volumus Magistrum illis Octo vel Septem sic consentientibus Assensum suum accommodare. Quod si ne Septem quidem sic ut prædictum est unanimiter consenserint, tùm is pro electo habeatur quem IPSE MAGISTER SOLUS nominaverit.

CHAP. 13th. De Sociorum Electione, ac ipsius Circumstantiis.

Porrò, delectum hunc, quoties eveniet, celebrari volumus et ordinamus quâq; Die Lunæ quæ proximè sequitur Dominicam quintam Quadragesimæ: quo die Magister et octo Seniores convenient in Sacellum, cum Horologium insonuerit octavam; et illic, primùm lecto Statuto de Cooptandorum Qualitatibus, Magister primùm deinde reliqui per Ordinem Seniores, Jusjurandum quod sequitur, tactis sacris Evangeliis, præstabunt. "Ego N. N. Deum testor, et Sancta ipsius "Evangelia, me Neminem in Socium hujus Collegij elec- "turum, nisi quem juxta Statutum antelectum mea Consci- "entia magis idoneum judicabit: neq; illud faciam, Pretio "vel Mercede aliquâ à quopiam aut datâ aut expectatâ, "neque ullâ aliâ siniſtrâ aut pravâ Affectione." Juratis singulis, fiat statim apertum Scrutiniùm, Seniores vero, ut Simulatio promittendi et Spes decipiendi è medio tollatur. juxta Senioritatis Ordinem, publicè et ut cæteri exaudire possint, Suffragia conferant; Et de quo Magister et quatuor ex dictis Senioribus consenserint, is pro Socio habeatur: Quòd si post alterum aut tertium Scrutinium, de uno, quatuor cum Magistro non consenserint, tùm *eodem Modo* procedatur, quo in Electione Præsidis et Lectorum et aliorum Officiariorum dictum est; Et is Socius habeatur, qui *eo* modo electus fuerit.

CHAP.

Chap. 14th. Jusjurandum electi Socii. * P. 184.

" Quòd ſi contingat me poſthac propter Contemptum, " Rebellionem, Inobedientiam, malos Mores, vel alia Me- " rita, vel propter Cauſas in præſentibus Statutis contentas, " per Magiſtrum vel alios in hujuſmodi Negotiis habentes " interceſſe, corrigi aut puniri aut à dicti Collegij Suſtenta- " tione et Societate ſecundùm Formam Statutorum excludi " expelli vel amoveri, ipſum Magiſtrum aut aliam Perſonam " ullam, Occaſione Expulſionis aut Amotionis hujuſmodi " nunquam perſequar ſeu inquietabo, per me, alium, vel " alios ; nec ab aliis moleſtari, vexari ſeu inquietari procura- " bo in foro Eccleſiaſtico, ſeu Seculari, ſeu alio quocunq; " Modo : Sed contrz, ex certa meâ Scientia purè, ſponte, " ſimpliciter et abſolutè, omni Actioni, Occaſione Correc- " tionis, Punitionis, Excluſionis, ſeu Amotionis hujuſmodi, " adverſùs Magiſtrum, alios dicti Collegii Socios et " Scholares, mihi quomodolibet conjunctim ſive diviſim " competenti, Appellationi quoque et Querelæ in et Parte " faciendis, ac quarumcunq; Literarum Impetrationi, etiam " Precibus Principum Procerum, Magnatum, Prælatorum " et aliorum quorumcunq; (quantumcunq; mihi aliàs *Pro-* " *bitatis* et Vitæ Merita ſuffragabuntur,) in Vim Pacti re- " nuntio."

Chap. 50th. De ambiguis et obſcuris interpretandis.

Diſtribuimus jam univerſis Collegii Membris Officia ſimul et Officiorum Leges: quæ ſi ſerventur ad amuſſim et inviolata, (quod utique vehementer optamus,) ex eodem viros haud dubio ſperamus prodituros, qui magnæ tum Utilitati tum Honori, non ſolùm huic Collegio, verùm etiam toti Regno futuri ſunt: Proviſum etiam eſt, quoad fieri poteſt per uniuſcujuſque Juramentum, (quo nihil apud Chriſtianos firmius aut antiquius haberi debet,) ut Statuta hæc per Nos jam tradita exactiſſimè ſerventur à ſingulis, quatenùs unumquemq; concernant.

Abrogatis igitur quibuſvis aliis Statutis pro hujus Collegii Gubernatione priùs excogitatis, hæc Præſentia cum vera tum ſalubria pronunciamus ; quibus obſervandis, tam Magiſtrum quàm Socios et Diſcipulos aſtringi volumus ; *reſervatâ nobis* nihilominus Poteſtate, vel adjiciendi vel minuendi, ſeu reformandi, interpretandi, declarandi, mutandi, derogandi, tollendi, diſpenſandi, novaq; rurſus alia, ſi Opus erit, Statuendi et edendi, non obſtantibus his Statutis factis et Juramento firmatis ; *Ceteris autem omnibus*, cujuſcunq; Dignitatis, Authoritatis, Statûs, Gradûs, aut Conditionis exiſtant,

* P. 185. * exiſtant, ac Magiſtro quoq; ac Scholaribus tam Sociis quam Diſcipulis omnibus hujus Collegii *inhibentes*, ne cum aliquo dictorum Statutorum diſpenſet, aut ulla nova Statuta ſive pro Collegio ſive pro quocunq; ejuſdem Membro, quæ dictorum Statutorum alicui repugnabant, condant et decernant. Quòd ſi forte Cancellarius, aut Vice-Cancellarius, aut *Reverendus Pater Elienſis Epiſcopus*, aut demùm quivis alius contrarium attentaverit, et novum aliquod Statutum aliud à prædictis adhibere molitus fuerit; ab ejus Obligatione, Authoritate noſtrâ, Magiſtrum et cæteros omnes tam Socios quam Diſcipulos penitùs abſolvimus, eiſq; omnibus et ſingulis interdicimus, ne ulli hujuſmodi Statuto aut Ordinationi pareant, admittantve quovis pacto, ſub Pœna Perjurii atq; etiam Amotionis perpetuæ à dicto Collegio ipſo Facto.

Quòd ſi inter Magiſtrum et Socios, aut inter Socios ipſos, aliolve noſtri Collegii, ſuper aliquo Articulo Statutorum noſtrorum, Dubium aliquod, aut Ambiguitas, Controverſia ſeu Opinionum Varietas, vel Diſcordia oriatur, cujus Deciſio ſeu ſanus et planus intellectus, intra octo Dies, à Tempore exorientis emergentis et commotæ Dubitationis computando, nequiveit inter eos haberi; tunc Volumus ut Partes diſſidentes duos ex Collegio Socios eligant, qui, ita electi quam citò poterit, REVERENDUM EPISCOPUM ELIENSUM *pro tempore exiſtentem*, (in quo ſinceram fiduciam ponimus, quemq; juxta planum, communem, literalem et grammaticalem Senſum et ad Dubium prætenſum aptiorem, omnes hujusmodi Ambiguitates interpretaturum, diſſoluturum, declaraturum, arbitramur) ubicunq; intra Regnum Angliæ fuerit, *adeant*; vel ſaltem totam Controverſiam, in duobus Scriptis, ſuâ ipſorum Manu aut Notarii Publici Subſcriptione, vel alicujus Sigilli authentici Appoſitione, munitis, *eidem Reverendo Patri* ſignificent.

Cujus quidem Reverendi Epiſcopi Determinationi, Interpretationi et Declarationi, ſuper prædicto Dubio ita ut præfertur diſputato ac ad eum delato, faciendis, Magiſtrum Præſidem Socios et cæteros omnes dicti Collegii obtemperare Volumus, et cum effectu parere; ſub ipſorum debito Juramento Collegio præſtito, et Pœna Amotionis perpetuæ a dicto Collegio, ſi contra fecerint, ipſo Facto; Nolentes quod per Conſuetudinem ullam, aut diuturnum quemlibet Abuſum, aut demùm Actum aliquem, Verbis aut Intentioni dictorum Statutorum in aliquo derogatur: Illud autem imprimis mandamus, ut Juramentorum ſuorum meminerint, atque noſtram Mentem in ipſis Statutis reſpiciant, magis quam aliquem (qui præter Aſſenſum noſtrum clàm irrepſit) eorundem Statutorum Abuſum. VISITATIONEM *autem hujus Collegij Reverendi in* ☞ *Chriſto Patribus* EPISCOPIS ELIENSIBUS, COMMENDAMUS; quibus et *conceſſimus cujuſdam idonei Præſentationem*, qui ſit futurus in hoc Collegio Socius: idoneum autem intelligimus,

qui

* qui Qualitates habeat eaſdem quæ deſcribuntur in Statuto de Qualitate Sociorum; *neq; enim alium quempiam* RECIPI *Volumus a Collegio*; neminem autem illi præſentent, niſi talem qui pro ſuis Meritis hoc Sodalitio dignus fuerit, et cui cum ſtatutis per omnia conveniat. * P. 186.

Chap. 51ſt. De Viſitatore.

Nihil adeò bonis Legibus firmari muniriq; poteſt, quin ab iis qui licenter vivere et Luxui et Libidini Fræna laxare ſtudent, aliquo Fraudis Commento facilè queat illudi. Nos igitur Fiducia Benignitatis Reverendi in Chriſto Patris *Epiſcopi Elienſis* qui nunc eſt, *et Succeſſorum Suorum*, freti, confiſique quod Orthodoxæ Fidei et Reipublicæ Chriſtianæ Zelo hæc noſtra Statuta perpetuis futuris Temporibus inviolabiliter, ad Laudem Dei et Honorem Collegii, obſervari procurabunt et nitentur; et ea vel eorum aliqua, contra noſtram Mentem et ſanctiſſimum piæ Fundatricis Inſtitutum, minime violari patientur;

Statuimus ordinamus et volumus, ut Episcopus Elienſis *qui pro tempore fuerit*, quoties per Magiſtrum et quinque ex Senioribus, ſive per ſeptem Seniores, reluctante Magiſtro, requisitus *fuerit* ad Collegium valeat et *poſſit accedere*; Magiſtrum, Præſidem, Decanos, Theſaurarios, Socios, Scholares et Diſcipulos Collegii, in Eccleſiam ejuſdem convocare; *Collegium tam in Capite, quam in Membris* visitare; ac de et ſuper omnibus et ſingulis, Statum Commodum et Honorem dicti Collegii, Statuta, Magiſtri, Præſidis, Decanorum, Theſaurariorum, Sociorum, Diſcipulorum vel Miniſtrorum Reformationem et Correctionem, concernentibus, diligenter inquiret; Juramentum, "de dicendo Ve-"ritatem in Præmiſſa omnibus et ſingulis," ab iiſdem exigere; Crimina, Exceſſus, Delicta et Negligentias quorumcunq; dicti Collegij, qualitercunq; Commiſſa in eâ Viſitatione comperta, ſecundùm Criminum, Exceſſum, Delictorum et Negligentiarum Qualitatem et Exigentiam, debitè *punire corrigere* vel *reformare*, ac Jurisdictionem suam Ordinariam, *quam volumus et hoc Statuto noſtro ordinamus* ad eundem Epiſcopum Elienſem et Succeſſores ſuos in perpetuum ſpectare et pertinere, in Magiſtrum et Socios dicti Collegij *exercere*, cæteraque omnia et singula *facere et exercere quæ ad eorum Correctionem et Reformationem ſunt neceſſaria aut quovis modo opportuna: etiam ſi ipſum ad Privationem ſeu Amotionem* Magiſtri Præſidis aut alterius cujuſcunq; ab Adminiſtratione vel Officio, ſeu ad Amotionem alicujus Socii Scholaris vel Diſcipuli ab eo Collegio, (Si tamen hoc ipſum Statutum et Ordinationes exigant,) procedere contingat. Eum autem volumus, Viſitatione ſemel inceptâ atq; inchoatâ, ut quam citò commodè poterit, cauſas omnes dijudicet

*P. 187. * dijudicet et determinet, ac Finem Viſitationis ſuæ omninò *intra quindecim* poſt ejus ad Collegium Acceſſionem Dies faciat.

Statuimus inſuper, ut *in Viſitationibus Collegij per Reverendum Patrem Elienſem Epiſcopum* quemcunque pro tempore exiſtentem, nullus Sociorum aut Scholarium contra Magiſtrum aut aliquem alium illius Collegij quicquam dicat, deponat, detegat, vel denunciet, niſi quod verum credat, ſeu de quo publica Vox et Fama contra eundem laborat, ſub Pœna Violationis Juramenti ab iiſdem Sociis et Scholaribus Collegij præſtiti: Et ſuper Exceſſibus vel Delictis in Viſitatione et Inquiſitione hujuſmodi, Detecti, denunciati vel accuſati, (Copiis detectorum et compertorum, nominibuſq; detegentium iis minimè traditis vel oſtenſis,) ſuper Exceſſibus et Delictis hujuſmodi conſtituti coram Domino Elienſi Epiſcopo, ſummariè et de plano procedente reſpondeant et eorum quilibet reſpondeat per ſe, Correctionem debitam pro iiſdem ſubeat et eorum quilibet ſubeat, ſecundùm noſtrarum Ordinationem et Statutorum Exigentiam et Tenorem; ceſſantibus quibuſcunque Provocationibus, Appellationibus, Querelis, et aliis Juris et Facti Remediis, per quæ ipſorum et cujuſlibet eorundem Correctio et Punitio differri valeat, ſeu alias quomodolibet impediri—Si tamen ad Privationem Magiſtri, aut Expulſionem Socij Scholaris vel Diſcipuli agatur, tunc volumus et ſtatuimus ut oſtendantur ei Detecta: Quæ ſi rationabiliter et probabiliter evitare et juſtâ Defenſione propulſare non poteſt, volumus ut amoveatur, ſine Appellatione aut ulteriori Remedio.

Et ſi quæ alia in Membris corrigenda et reformanda fuerint, quæ Brevitate Temporis corrigi et reformari non poterint, ea omnia et ſingula Magiſtro in Scriptis tradet: qui, ſecundùm Formam et Exigentiam Statutorum, et in virtute ſanctæ Obedientiæ ac Juramenti ſui, ſub Violationis Pœnâ, hujuſmodi corrigenda et reformanda diligenter et fideliter corrigere et reformare ſtudebit, et tenebitur. Diſſolutâq; Viſitatione, pro Eſculentis, Poculentia, Expenſis, Oneribus, et Procurationibus ratione Viſitationis hujuſmodi debitis, volumus et ſtatuimus ut Summa pecuniaria, in bonas Memoriæ Domini Jacobi olim Elienſis Epiſcopi Conceſſionibus et Ordinationibus limitata et declarata, abſq; dilatione quâlibet ſolvatur. Reverendi vero Patris Epiſcopi Elienſis ejuſcunq; pro Tempore exiſtentia Conſcientiam apud altiſſimum oneramus, & in Viſceribus Domini noſtra Jeſu Chriſti hortamur, ut in faciendo et exequendo Præmiſſa, ſecundùm Apoſtoli Doctrinam " non quærat quæ ſua ſunt, " ſed quæ Jeſu Chriſti ;" ſolumque Deum habens præ Oculis Mentis, Favore, Timore, Odio, Prece, aut Pretio, Coloribus aut Occaſionibus poſt habitis quibuſcunque Viſitationis, Inquiſitionis, Correctionis, Reformationis Officium diligenter impendeat, et fideliter in omnibus exequatur, ſicut

coram

coram Deo, in ejus extremo Judicio, in hoc Caſu voluerit reddere Rationem.

* His igitur dictis Legibus, &c. (ſicut in Concluſione Capitis de Viſitatore, in Epiſcopi Fiſheri Statutis.) * * P. 188 * V. p. 181.

Chap. 25th. De Modeſtia, et Morum urbanitate.

Omnes Lites domeſticæ INTER Collegium et cognoſcantur et dijudicentur. Qui foràs aliquem in Jus vocaverit, ſine Conſenſu Magiſtri, aut (eo abſente) Præſidis et majoris Partis Seniorum, Collegio amoveatur. Diſſentiones inter Socios Diſcipuloſve ortæ intra biduum, ſi fieri poſſit, à Magiſtro, aut (eo abſente) Præſide et octo Senioribus, ſedentur: Sin fieri non poſſit, quatuor Socij per diſſentientes eligendi, cum Magiſtro, aut (eo abſente) Præſide, Litem audiant, et cum Æquitate dirimant; et quam illi omnes, vel Magiſter (aut ſi ille abſit) Præſes, cum duobus ſic electis, Sententiam tulerint, in eâ conquieſcant diſſentientes: qui ſecùs fecerit, Collegio privetur. Lis verò inter Magiſtrum et Socium unum aut plures orta, à Præſide et reliquis Senioribus, aut (ſi Præſes unus litigantium non ſit) à Socio maxime Seniore, qui unus litigantium non ſit, et cognoſcatur et (ſi fieri poſſit) tranquilletur: Sin intra biduum hoc fieri non poſſit, ad *Præpoſitum Collegij Regalis, Magiſtros Collegiorum Trinitatis et Chriſti,* per duos Socios utrinque eligendos, Lis deferatur; et quod duo ex illis ſtatuerint, juxta Formam Statutorum aut Leges Regni noſtri, id ratum eſto. Qui non paruerit, Collegio amoveatur.

Alſo

In the Chapter relating to the Election of the Maſter,

It is ordained, That if Five of the Fellows, after two Scrutinies (to be ended upon the ſame Day) ſhould not agree upon One Perſon, Then they are to come to the *Viſitor of the College*; And He is to be eſteemed as Maſter, Whom the VISITOR *only ſhall* THINK FIT *to ſet over them:* Provided He anſwers to the Statute, in all Points, concerning the Quality and Office of Maſter; And the ſaid Viſitor ſhall ſignify to the Fellows of the ſame College, within 20 Days from the Day of ſuch Devolution upon Him, by an Inſtrument ſealed with the Seal of his Paſtoral Office, the ſame Perſon ſo promoted to the Maſterſhip.

In the Chapter relating to the Election of Preſident, Lecturers, and other Officers,

It is ordained, That if the Maſter and Fellows ſhould not agree in the Election; And the Maſter ſhould be out of the Kingdom; Then *He whom the Biſhop of Ely,* VISITOR

*P. 189. * SITOR *of the ſaid College*, being within the Kingdom, *ſhall nominate*, is to be elected into the Office.

N. B. By the *annexed* Foundation (i. e. the before mentioned Foundation of the two *Southwell*-Fellow-ſhips) *Some* Objects of Election were made preferable to *others*: And *Todington*'s Right, upon the Merits, depended upon his being a PREFERABLE Object; whereas *Craven* was only a *general One*. But the Exception taken to *Todington*, againſt electing *Him* into the Fellowſhip, though otherwiſe a preferable Object within Dr. *Keton*'s Deſcriptions, was his being MUTILATED, and *thereby* excluded, by the Foundation, from being capable to be choſen: For that by One of the old Statutes, (prior to Dr. *Keton*'s Deed, which refers to them) it is Ordained "That the Perſons eligible as Scholars, ſhould be *Corpore* nullis contagioſis aut incurabilibus Morbis vitioſo, "aliaſve deformi *aut* MUTILO." From whence it was inferred that though this Clauſe is not indeed repeated as One of the Qualifications of a Fellow, yet it muſt be ſo intended; For the Statutes could never mean to require leſs Perfection in the Fellows than in the Scholars; ſince the Fellows are expreſly deſcribed as *Potiora* et *ſolidiora* Membra Collegij, and are to be elected out of the Scholars; and are conſidered as deſigned for the Miniſtry and Holy Orders, into which no deformed or mutilated Perſons are admiſſible.

The Counſel who ſhewed Cauſe againſt the Prohibition, and who argued (at firſt) only from Queen *Elizabeth*'s Statutes, (for Biſhop *Fiſher*'s were not laid before the Court, till ſome Time afterwards) made three Points upon them; *viz.*

1ſt. Whether the Biſhop's general viſitatorial Authority does not extend to the Election of Fellows, upon the *Original* Foundation.

2d. Whether it extends to this annexed Foundation.

3. Whether the Clauſe which gives *Diſtreſs* upon the Eſtates of the College, *excludes* the Viſitor.

And ſeveral of Queen *Elizabeth*'s Statutes were read, on Behalf of the Viſitor; particularly, the 50th (de ambiguis et obſcuris interpretandis) and C. 51ſt. (de Viſitatore) and alſo C. 2. (de Electione Magiſtri.)

Contra, on Behalf of the College, were read and relied on, C. 25th. (de Modeſtia, &c. C. 13th. (de Electione Sociorum) and C. 11th. (de Electione Præſidis)

N. B.

*. *N. B.* All theſe were Queen *Elizabeth*'s Statutes: And it was ſaid by the Counſel for the Viſitor, that though *Biſhop Fiſher* AS *ſurviving Executor* of *Margaret* Counteſs of *Richmond*, gave Statutes; Yet he had no Power, AS *Executor*, to do ſo; and that therefore *Queen Elizabeth* afterwards gave *freſh* Statutes. * P. 190.

Cur'. Let it ſtand over till to-morrow: And Let Us have Copies of the material Statutes, in the mean Time.

On *Friday* the 26th of *November* 1756, This Motion proceeded. And on Behalf of the Viſitatorial Power, it was argued, 1ſt. That the Biſhop had a GENERAL *Right of Viſitation of the College*; which *included the* ELECTION OF FELLOWS, as well as *other* Matters that concerned the College; 2dly. That this General Right extends to the ANNEXED, as well as to the *Original* Foundation; and 3dly. That the *Clauſe of* DISTRESS, (which had been urged to be a *diſtinct and particular Remedy* given by the annexed Foundation,) *did* NOT *exclude* the general Right of the Biſhop to viſit.

Firſt—The original Foundation of the College was upon *expreſs Condition* "That the Biſhop of *Ely* ſhould be Viſitor." And Dr. *Keton*'s Foundation is incorporated with the Original Foundation: He was, in Effect, *only a Purchaſer* of two Fellowſhips and two Scholarſhips.

And the new Statutes (of Queen *Elizabeth*) were *ſubſequent* to Dr. *Keton*'s Foundation: And Dr. *K.*'s Fellows were *Part* of the College, at the Time when theſe Statutes commend the Viſitation of *the College*, i. e. of the *whole* College, *to the Biſhop of Ely* for the Time being. Theſe Statutes conſtantly ſpeak of the Biſhops of *Ely* AS *General* Viſitors of the College at *that* Time, and *already* ſo; and *not* as being conſtituted ſo, merely and only BY *thoſe Statutes* of Queen *Elizabeth*. And his *General* Viſitatorial Power *includes* the Election of Fellows, as well as other Matters.

The *General* Viſitor, upon *Lay* Foundations, is the *Founder:* Upon *Spiritual* Foundations, the *Ordinary*.

The *general* Power of Viſitation of the College is given to the Biſhop of *Ely*, *eo nomine* of "*Viſitor*."

No particular ſet Form of Words is neceſſary to the Appointment of a Viſitor. *Fitz-Gib.* 305. *Dr. Bentley* v. *Biſhop of Ely*—"*Viſitator ſit* Epiſcopus Elienſis," was the Biſhop's *whole* Right to be general Viſitor of *Trinity* College.

* P. 191. * And He is complete Viſitor: And ſuch Power may ceaſe and revive again. The Caſe of *The King* v. *Biſhop of Cheſter*, Warden of *Mancheſter* College, 2 *Strange* 797. proves this.

The late Caſe of *Dr. Green* v. *Dr. Rutherford* in Chancery, was only a Truſt, given upon another Footing.

No Objection can ariſe, as to the executive Part, from the legiſlative Power being reſerved to the Crown.

Deprivation and Admiſſion of Fellows are incidental and eſſential to the General Power of a Viſitor. Sir *T. Jones* 175. *The King* v. *Warden of all Souls College* in *Oxford*.

Neither is it any Objection, "that particular Times and "Occaſions of going to the College, are ſtated and ſpecifi-"ed:" For upon particular Gravamens, He may exerciſe the Power of Admiſſion and Deprivation, *eo nomine as Viſitor*.

Second Point—The Biſhop's General Viſitatorial Authority extends to the ANNEXED Foundation, *as well as* to the *original* Foundation. *Both* are within the ſame Reaſon: And theſe ingrafted Fellows are to be bound by, and even to ſwear to the Statutes then in being. And here, No new Statutes are given by the annexed Founder: And the Power he reſerved was only to give additional Ones *conformable* to the old Ones. And the Indenture *refers*, throughout, to the Original Foundation: Which is a ſtrong Implication. In 5 *Mod.* 421. indeed this point, "Whether the Viſitor appointed by the "Founder, can be extended to the new Fellows" was doubted. This is called Mr. *Jenning*'s Caſe, of *Clare-Hall*: It was then adjourned, and does not appear ever to have been determined. But on 21ſt *March* 1747, in the Caſe of the *Attorney-General, at the Relation of Mapletoft*, v. *Talbot*, (the Caſe of the Maſter and Fellows of *Clare-Hall* in *Cambridge*,) Lord *Hardwicke* held "That the *annexed* Founda-"tion, *where no new Statutes* are given, muſt *follow the* "*Original* Foundation."

Third Point—The Deed giving *another* Remedy, *viz.* by DISTRESS, does NOT *preclude the Viſitor*. It is *not ad idem*: It is given TO *the Church of Southwell*; NOT *to the Party injured* in Point of Election and Admiſſion. But however, *if it* HAD been given to the Party injured, it could not have taken away his *Appeal to the Viſitor*, for Relief: For the One is in Order to *obtain Election and Admiſſion*; the Other, for the *Profits*. The SPECIFIC *Relief* muſt come from the *Viſitor*: The Diſtreſs would be only for the *Delay*.

2 *Strange*

* 2 *Strange* 1061, *Middleton et Ux.* v. *Croft in B. R.* (the third and laſt Queſtion) It was reſolved "That the Statute "of 7 & 8 *W.* 3 *did not*, by inflicting a Penalty, take away "the Juriſdiction of the Spiritual Court." The Diſtreſs may be intended, to *prevent Colluſion* between the College and the Viſitor; And as a Method to bring the Matter *collaterally* in Queſtion: For notwithſtanding what may be ſaid in the Books, particularly in the Caſe of *Philips* v. *Bury (Exeter College Caſe,)* it would be very difficult to maintain a *direct* Action for ſuch Colluſion. * P. 192

Theſe new Fellowſhips were, by the Deed, to have *All* the Rights of other Fellows. Now *one* of theſe was a Right of Appeal. And ſhall the *Nomine Pœnæ* and Clauſe of Diſtreſs given to the CHURCH *of Southwell*, take away the DISTINCT *Rights* of the CANDIDATE, and of the BISHOP? No: *They* have a Right to the *Remedy*; but *none* to the *Penalty*; The Penalty belongs *to the* CHURCH of *Southwell*. But *if* the Penalty had been given TO *the* CANDIDATE; Would that have DISCHARGED the College's Obligation to perform their Contract? And the Reſtriction from going "*foras*," does not exclude the *Viſitor*, (for He is *domeſtic*;) but it only excludes *forenſic* Juriſdictions, *Courts of* Law.

And the *collateral Penalty* cannot hurt the SPECIFIC *Remedy*: For it is *not adequate* to the Injury; Nay, it is *not* even given to the PERSON *injured*; and it is *temporary*. However, the *ſame* Perſon may have SEVERAL *Remedies*. And this is not the firſt Inſtance of the preſent Queſtion, in this very College; For Mr. *Pegg*'s Caſe in 1726 was in Point; and there the College ſubmitted. The Caſe was exactly the ſame with the Preſent, excepting only that it was upon Dr. *Hereford*'s Foundation; which alſo was by *Deed*, and with a *Clauſe of Diſtreſs*, as this is. His Foundation was likewiſe of two Fellowſhips and two Scholarſhips in this College, by Indenture tripartite, made 12 *February* 11 *H.* 8. between the College, the Dean and Chapter of *Litchfield*, and Himſelf; in Conſideration of 400l. given by Him to the College: In which Indenture a Forfeiture is fixed; And a Right of Entry into the College-Lands, given to the Dean and Chapter of *Litchfield*, to diſtrain for it. Mr. *Pegg* was elected. Mr. *Burton* appealed to the Biſhop of *Ely*, as Viſitor. Mr. *Pegg* proteſted againſt his Juriſdiction. Civilians and Common Lawyers were heard, upon the Point of the Juriſdiction. The Viſitor pronounced for his own Juriſdiction; and afterwards gave Sentence for Mr *Burton*, the Appellant; and iſſued his Monition to the Maſter Preſident and Six Senior Fellows, "to admit Mr. *Burton*." This Monition was *obeyed*; and Mr. *Burton admitted* into the Fellowſhip, by the Preſident: By whom a Certificate thereof was duly returned to the Viſitor.

* P. 193. * The Right of Viſitation ariſes from the Common Law; as Ld. Ch. J. *Holt* held in the Caſe of *Philips* v. *Bury*: * *V. Skinner* 483, 484. * (though Biſhop *Stillingfleet* ſaid it aroſe from the *Canon* Law.) There was a Caſe of this very College, which is reported in 4 *Mod.* 233. *Rex & Regina* v. *St. John's College, Cambridge*; and *Comb.* 279. S. C. and *Skinner* 359, 368, 393, 546. S. C. Where the Court thought they ought to ſee that the Law be executed. And another Caſe alſo, relating to the ſame College, was Dr. *Rutherford*'s Caſe; which was upon a ſpecial Truſt. But the Courts of Juſtice will not interfere, unleſs the Viſitor abuſes his Power, in exerting it where He ought not.

Then the Counſel for the Biſhop and Mr. *Todington offered* AFFIDAVITS, as to Matters of Fact.

But Lord *Mansfield* ſaid, This Court cannot enter into the MERITS *of the* ELECTION: For the Queſtion *before* Us is "Whether the Biſhop of *Ely* appears to have a *Right* "*to judge* in this Caſe, as Viſitor." If He has, there is No Ground to prohibit: If He has no ſuch Juriſdiction, He ought to be prohibited.

The Counſel who argued for the Prohibition, began with laying down ſome *General Poſitions*—As, that *Fundatorial Right* takes its Riſe from the Property of the Donor; That a *Founder* may give Statutes; That *if* He does *not*, the Right of viſiting remains in the Founder or his Heirs; That He may appoint a Viſitor, either *general* or *partial*, (with Regard to his Powers,) as He himſelf pleaſes; That if He gives him *only partial* Powers, the Viſitor *cannot exceed* them; That if the Viſitor ſhould attempt it, the Court will by Prohibition *reſtrain the Exceſs* of Juriſdiction; That the Court will never refuſe *Liberty to declare* in Prohibition, wherever there is the *leaſt Doubt*, (in order that the Matter may be ſolemnly determined upon Record, and ſo be ſubject to a regular Courſe of Appeal;) That a Viſitatorial Power is not to be inferred by *Implication*, but muſt be given by *expreſs and direct* Words; (as was determined by Lord Chancellor *King*, aſſiſted by two great Judges of the Common Law, in the Caſe of *Eden* v. *Foſter*, reported in 2 *Peere Wms.* 325. the Caſe of *Birmingham* School.)

Then they entered upon their Argument, to the following Effect. 1ſt. The Biſhop of *Ely is not* GENERAL Viſitor of this College; but *only* Viſitor in *particular* Inſtances: And the *General* Right of Viſitation in *all other* Inſtances, remains in the *Crown*. This, they ſaid, will appear from the 50th, 51ſt, and 52d Chapters of Queen *Elizabeth*'s Statutes.

V. ante, 188. Poſt. 194, *c.* 25th de modeſtia.

C. 50th.

* C. 50th. "*Reſervata* NOBIS Poteſtate vel adjiciendi vel minuendi, ſeu reformandi interpretandi &c. *Cæteris* autem OMNIBUS &c. inhibentes &c. And immediately after, the Biſhop of *Ely* is PARTICULARLY *there named*, as one of the Perſons *prohibited* from counteracting the Statutes. And it concludes with giving the Biſhop of *Ely*, a *Compenſation, viz.* the Nomination of a Fellow; who muſt be *idoneus*: And the *College* are appointed to *judge* of the Idoneity: For it is ſaid, "*Neque* enim alium quempiam *recipi* volumus à *Collegio*." Indeed the Biſhop is immediately afterwards admoniſhed to offer no other than a proper Perſon: But ſtill the *College* are to be the Judges, even of the *Biſhop*'s own Nominee. * P. 194.

C. 51ſt. (de Viſitatore) gives him Power *accedere*, only *quoties* he ſhall be requeſted &c. and he is thereby reſtrained to cloſe his Viſitation within 15 *Days*: And there are many *particular* Powers minutely given him; *Which exclude* the Suppoſition "That he has the *general* Power,"

C. 25th. (de Modeſtia) directs that omnes Lites domeſticæ *intra* Collegium et cognoſcantur et dijudicentur; and orders Expulſion to him qui *foras* vocaverit &c. and refers their Domeſtic Diſputes to be ſettled either amongſt themſelves, in College; or by the reſident *Maſters of the other Colleges* particularly therein named.

They denied that in Dr. *Bentley*'s Caſe, the Expreſſion "*Sit Viſitator*," was the *Ground* of the Reſolution; (which Words, however, are *not*, as they obſerved, in the preſent Caſe.) But in that Caſe the *Intent* of the Crown fully appeared, *throughout*, "to give the *whole* Power to the Biſhop "of *Ely*." Whereas here, the Crown *reſerves* Powers to itſelf, of various Kinds; and might have appointed *new* Viſitors: But there, on the contrary, the Right was *perpetually* given to the Biſhops of *Ely*. Here, the Biſhop's Viſitatorial Power is *limited* and *circumſcribed*: Whereas a *general* Viſitor might do all that a *Founder* could do. Here, he cannot viſit *ex Officio*, in leſs than 5 Years.

As to *Strange* 797. The Biſhop of *Cheſter*'s Caſe, as Warden of *Mancheſter* College—They agreed that in certain Caſes, the Viſitatorial Right may be ſuſpended, and revive again. But that Caſe, they ſaid, was not at all like the preſent Caſe.

As to the Caſe of *Dr. Green* v. *Dr. Rutherford*—It was only a Conſtruction of a Will, containing a *Truſt*; which was not an Object of the Viſitatorial Juriſdiction. Beſides, the Point of Judgment in that Caſe, they ſaid, was with them.

And

* P. 195. * And they concluded that therefore No Appeal lies to the Biſhop of *Ely* in the *preſent* Caſe, upon the Foot of its being, *in general*, ONE of the Fellowſhips of this College.

2dly. Much leſs does it lie in this Caſe of an ANNEXED Fellowſhip given by a *ſubſequent* Foundation. The Law will NOT *imply* that Dr *Keton*'s Foundation is ſubject to any *other* Viſitor than Himſelf and his Heirs. An *ingrafted* Foundation does not fall under the former Powers, IF the annexed Founder gives *other* Laws.

Now this is not a *Co*-Foundation, but a *New* Foundation.

It is not true, "That Dr. *Keton knew* the Biſhop of *Ely* "to be General Viſitor." On the contrary, the Biſhop was NOT *ſo*, by Biſhop *Fiſher*'s Statutes: For by thoſe Statutes, the Biſhop had no Right to interfere in the † *Election of Fellows*. And Dr. *Keton* reſerved a Power to give Statutes conſiſtent with the Statutes of the College: And this Right is either *ſtill ſubſiſting* in Dr. *Keton*'s Heir; or *devolved* to the Crown. Now at *that Time* of Dr. *Keton*'s Foundation, the Biſhop of *Ely* had *no* Right of Viſitation *as to* the *Election of Fellows*.

† Ante pa. 181. Poſt. 196.

3dly. Here is a COMMON-LAW *Redreſs* given; which No *Viſitor* can have a Right to *diſcuſs*. And the *ſpecific Remedy* is not to come from the *Biſhop of Ely* at leaſt: Whatever it may be, or from whomſoever it is to come. They may go to a proper Juriſdiction for it. And as to the Caſe of *Burton* v. *Pegg*, perhaps the Biſhop of *Ely* was appointed Viſitor by Dr. *Beresford*: Or the Party concerned might not think proper to oppoſe, or not be able to oppoſe the Biſhop's Proceeding. However, the Submiſſion of the *College* cannot take away the *Right* of the *Founder*, nor the Right of *this Court*; *nor give to the Biſhop* a Right which he has not in him.

As to 4 *Mod.* 233. *Rex et Regina* v. *The Maſter and Fellows of St. John's College*, and *Skinner* 359, *&c.* S. C. (Dr. *Gower*'s Caſe) and *Comberb.* 279. S. C. The Return was not the Dictum of the *College*: And ſuch general Terms were out of the Caſe and improper. And the Caſe of *Middleton & Ux'* v. *Croft* is not applicable. *The Regiſter of Writs*, Title *Prohibitiones*, *pa.* 38. is ſimilar to this Caſe, as to the being a Common-Law Contract: "Cum placita de annuali-"bus redditibus &c. &c. &c. ad nos et Coronam et Digni-"tatem noſtram ſpecialiter pertineant &c."

The Viſitor is *bound by the Deed*; And he cannot have any Pretence to proceed in this Caſe, *until* the Covenants are broken, and the College have incurred the Penalty: And of

* of THIS, the Courts of *Common* Law are to judge. If † P. 196.
both Juriſdictions ſhould proceed *together*, their Determinations may directly claſh—Therefore the Common-Law Courts will prohibit him from proceeding at all.

Dr. *Keton* was a PURCHASER of theſe two Fellowſhips: And he reſerved a *Power of Diſtreſs*. The Requiſites to his Fellowſhips are, being a *Choriſter of Southwell*, if, &c. and having *Learning*, and *Morals*. If the College ſhould fail to chooſe *ſuch* Perſons, &c. they are ſubject to a *Forfeiture*; for which, a *Diſtreſs* may be taken: This is the Sanction annexed; And this is an *adequate Remedy*. And upon this Deed, the Chapter of *Southwell* are only *Truſtees for* the Candidate; And they would be anſwerable to him. And this would ſubject the Matter to the Court of Chancery, as a Truſt; and might alſo ſubject it to this Court, as to granting a *Mandamus* to admit him. And therefore, *though* the Biſhop ſhould even be conſidered as *general* Viſitor of the College, Yet this Court would prohibit him, from proceeding in this particular Affair; or at leaſt, give the College Leave to *declare* in Prohibition. This Court will prohibit Juriſdictions who are proceeding without Right; *although* they themſelves cannot, perhaps, give an *adequate* Remedy. However, here, the Founder conſiders the Diſtreſs as an adequate Remedy.

They concluded with ſaying that they only deſired Leave to *declare* in Prohibition; not an *abſolute* Prohibition.

Mr. Juſtice *Foſter* ſaid he had not ſeen Biſhop *Fiſher*'s Statutes; which *though now* repealed, were yet in Force *at the Time* of this annexed Foundation: And they are ſaid * *to reſtrain* the Biſhop from exerciſing any Powers relating to the *Election of Fellows*. Now THAT may deſerve Conſideration, *though* theſe Statutes ſhould be *now* expired: For they were underſtood to be IN FORCE at *that* Time when Dr. *Keton* made his Foundation. * V. Ante 181 & 195.

On the Day followſhip (*viz. Saturday* 27th *November* 1756) Ld. *Mansfield* ſaid that upon looking into the Papers left with him, he found it neceſſary, towards coming to a complete Underſtanding either of the Statutes or of the Deed, "That the PRIOR *Coſtitution* of the College, ante-"cedent to *Both*, ſhould be laid before the Court;" As both the Deed and alſo Queen *Elizabeth*'s Statutes *expreſsly* REFER to this *prior Conſtitution* of the College, and conſequently muſt be (in ſome meaſure) unintelligible and inexplicable, unleſs it be alſo known, "WHAT that prior Conſtitution *was*." He propoſed therefore that the Parties ſhould, in the beſt manner they could, lay this Conſtitution before the Court; and that the Caſe ſhould be ſpoken to again in the next Term; not by all the Counſel arguing it over again, but by only *one* Counſel on each Side, who ſhould adply

apply themſelves to *ſuch Concluſions* as might ariſe from ſuch prior Conſtitution of the College, and be applicable to Queen *Elizabeth*'s Statutes or to the Deed of Covenants.

* P. 197. * The Caſe was accordingly adjourned till next Term, to be then ſpoken to by one Counſel on each ſide, on the *prior* Conſtitution of the College; antecedent to Dr. *Keton*'s annexed Foundation and Deed, and conſequently to Queen *Elizabeth*'s Statutes likewiſe.

On this Day (i. e. *Thurſday*, 3d *February* 1757) this Caſe was again ſpoken to, by one Counſel on each Side.

Mr. *Yorke*, Solicitor General, on the Part of the Biſhop and Mr. *Todington*, made 3 Queſtions, *&c.*

1ſt. Whether the Biſhop is not *as extenſive a Viſitor*, under the *Old* Conſtitution, as under the *New*?

2dly. Whether the *College* are not *bound* by the *Acceptance of the new* Statutes?

3dly. Whether Dr. *Keton*'s *Fellowſhips* are not *bound* by the *Acceptance of the new* Statutes, *as well as the Reſt* of the College?

Firſt—He inſiſted that the Biſhop is as extenſive and complete a Viſitor under the *Old* Statutes, as under the *New*. This he endeavoured to make out, from the Old Statutes of the College. [And upon theſe, the Queſtion muſt depend.]

Secondly—The *College* are *bound by the Acceptance* of the *New* Statutes.

Ld. *Mansfield*—The College *will not* (moſt undoubtedly) agitate *that* Queſtion: For if they do, they muſt give up All their Livings, *&c.* and all other Advantages that they claim UNDER them.

Mr. *Norton*, on the Part of the College, readily agreed to this; ſaying that they *ſhould not* (certainly) make a Queſtion of this; having *acted* 200 *Years* UNDER *theſe new Statutes*.

Mr. Solicitor General then proceeded to his 3d Queſtion.

Thirdly—He inſiſted that Dr. *Keton*'s *Fellowſhips* are *bound* by the *New* Statutes, *as well as the Reſt* of the College: For, as he has *not given new* Statutes, theſe Fellowſhips are to be conducted and bound by the *ordinary* Statutes of the College; and the rather, for that *theſe* Fellows enjoy all Privileges, and come into the Seniority, in the *ſame Manner as the Reſt* of the Fellows do.

Mr.

*Mr. *Norton*, *contrà*, for the College. * P. 198.

This Caſe ſtood over, in Order to ſee what was the State of the College, *at the Time* when Dr. *Keton*'s Deed of Covenant was made; *At which Time Biſhop Fiſher*'s Statutes *ſubſiſted*.

The Biſhops of *Ely* were Owners, originally, of the *Site* of the College; And, as *Biſhops of Ely*, were *ordinary* Viſitors of this Place: From One or both of which Circumſtances, they might poſſibly ſet up a Right of Viſitation. Now Biſhop *Fiſher*'s Statutes profeſſedly mean to obviate any ſuch Pretenſion: and to prevent the Biſhops of *Ely* from claiming a Right of Viſitation, *as General* Viſitors of the College. Which Poſition Mr. *Norton* endeavoured to prove from Biſhop *Fiſher*'s Statutes. And He ſaid that if the Statutes were to be conſtrued otherwiſe, it would occaſion a Claſhing of Juriſdictions and the utmoſt Confuſion in the College. As to the Power or Viſitation that the Biſhops of *Ely* may have at *common Law*, He ſaid He did not mean to diſpute *that* with them; But as to the Claim of a General Viſitatorial Power over the College, He prayed Leave to *declare* in Prohibition; that it might be ſolemnly determined upon Record, and that each Side might have an Opportunity of appealing elſewhere, if diſſatisfied with the Determination of the Court.

He ſtrongly contended, That it was *premature*, to determine *now*, "Whether the Biſhop of *Ely* had Juriſdiction;" That there ought to be a Rule for the Plaintiffs to *declare*; That ſuch was the Courſe of the Court, and it had not been uſual to examine the Matter upon *ſhewing Cauſe: After a Declaration* in Prohibition, the whole would appear upon Record, be ſolemnly judged, and the Judgment might be revived upon a Writ of Error.

Lord *Mansfield*—*If* the Party who applies for a Prohibition has a Right to declare, though the Court ſhould ſee *no Ground* for the Motion; A Rule "to ſhew Cauſe why the "Prohibition ſhould not be granted," is to no Purpoſe; and Hearing Counſel upon the Sufficiency of that Cauſe is Time miſpent.

When the Matter ſeems *doubtful* to the Court, upon a Queſtion of Fact or Law, the Plaintiff has Leave to declare; that the Parties may have the Fact properly tried by a Jury, or the Law ſolemnly conſidered, as in a Cauſe.

When the Court is clearly of Opinion that there *is* ſufficient Ground for the Prohibition, the Defendant has a Right to put the Plaintiff to declare; that his Juriſdiction may not be taken from him, in a ſummary Way, where no Writ of Error

* P. 199. * Error will lie. But if the Court be *clearly* of Opinion That there is NO *Ground* for a Prohibition, It ought to be denied, *without* putting the Defendant to Expence, and delaying, in the mean Time, the Exercise of what appears to them a *lawful* Jurisdiction.

This Denial is *not conclusive* to the Plaintiff. *If* there is *no* Jurisdiction, the Sentence will be a *Nullity*; and upon any attempt to execute or inforce it, the whole may be tried in an Action. The Plaintiff may also apply to any *other* Court in *Westminister-Hall*, for a Prohibtion; and take *their* Opinion.

If, in Cases of this kind, the Court should too easily yield to hang up the Matter, by letting the Plaintiff declare in Prohibition: Redress would come too late, and cost too much.

I was very desirous, as there is no Fact disputed, to go fully into the Argument *now*; and if I saw no Ground to doubt of the Bishop's Jurisdiction as Visitor, to stop unnecessary *Delay*, *Vexation*, and *Expence*.

The *Subject-Matter* of the Complaint to the Visitor is a Competition for *present* Maintenance and Education; upon an Eleemosynary Foundation: the *Cause* of the Contention is a *controverted Election*; which is too apt to engage and animate the Electors.

In Compassion to the Candidates, and for the Peace of this learned Body: the Dispute *ought not* to be suffered to continue longer than is absolutely unavoidable.

If the Plaintiff might, *as of Right*, demand to declare in Prohibition, the *Consequences* would be fatal, in both Universities. The College, as here, (i. e. the Majority which determines the Body,) would support the Election they had made, and may easily keep the Visitor off for Years; their public Stock would be applied to defray the Charge: In the mean Time Elections of new fellows might come on; their Validity might depend upon the Rights in Dispute; the Election of Masters might come on; Great Abuses, in such a State of Confusion, would naturally creep in; Discipline could not be kept up; Intestine Heats and Divisions would counteract the whole Intention of the Founder. The Reason of a Visitor would be destroyed. He is appointed and made absolute upon *this* Principle, "That, in these Societies, "Error of Judgment, the Chance of Partiality, or Injustice, "is a *less Evil* than the Duration of Contention:" But if, by disputing His Jurisdiction without Ground, His Exercise of it may be protracted as long as a Cause can be kept up for Delay, by Parties who do not regard the Costs, The Membes of every College in both Universities who complain of an In-

jury

* jury done, muſt be ſubjected to *both* Inconveniences; 1ſt. To the Law's Delay, in the moſt deliberate Method of judicial Proceeding; and, at laſt, To the Award of an abſolute Judge, in the moſt ſummary Method of Trial. * P. 200.

If We are clear "that the Biſhop *has* Juriſdiction," We ſhould do Injuſtice in the Preſent Caſe, and ſet a bad Precedent for keeping up Groundleſs Strife, if We did not *diſcharge* the Rule. And therefore I think, the Merits ſhould be fully gone into *now*.

As to the *Merits*—

The 1ſt Queſtion *is* "Whether the Biſhop of *Ely* is "Viſitor of *St. John*'s College, *as to the* ELECTION *of* "*Fellows* and other Officers:" (For ſo is the Suggeſtion; where the Averment is "That He is not Viſitor *in* THAT "*Reſpect*; And the Maſter and Senior Fellows make the Complaint.)

The 2d Queſtion is, "Whether, ſuppoſing him to have "this Power, as to the Fellows of the OLD Foundation, "He has alſo the *like Power*, as to Fellows of this NEW "ANNEXED Foundation of Dr. *Keton's*.

The Viſitatorial Power, if properly exerciſed, without Expence or Delay, is *uſeful* and *convenient to Colleges*. However, (be that as it may,) We muſt take it, as it is now *eſtabliſhed* by Law: And it is now ſettled and eſtabliſhed, (ſince the Caſe of * *Philips* and *Bury in Dom. Proc.*) "That "the Juriſdiction of the Viſitor is *ſummary* and *without Appeal* from it." * V. 4. Mod. 106. and Skinner 447. Show. P. C. 35, &c.

Theſe *Foundations of Colleges* are to be conſidered in *two Views*, *viz.* as they are *Corporations*, and as they are *Eleemoſynary*.

As Eleemoſynary, They are the Creatures *of the Founder*; He may delegate his Power, either *generally*, or *ſpecially*; He may preſcribe *particular* Modes and Manners, as to the Exerciſe of *Part* of it. If he makes a *General* Viſitor, (as by the general Words "*Viſitator ſit*,") the Perſon ſo conſtituted has all incidental Power: But he may be *reſtrained as to* PARTICULAR *Inſtances*. The Founder may appoint a *ſpecial* Viſitor *for a particular* Purpoſe, *and no farther*. The Founder may make a *general* Viſitor; And *yet* appoint an inferior *particular* Power, to be executed without going to the Viſitor in the firſt Inſtance.

No *technical preciſe* Form of Words is neceſſary for the Appointment of either General or Special Viſitor. In a Caſe before Lord *Hardwicke*, on 21ſt *March* 1747, *Attorney General*

* P. 201. * *neral* v. *Talbot*, in Chancery, " the Chancellor of the Uni-
" verſity was held to be general Viſitor of *Clare-Hall*,
" *without* expreſs Words of Appointment:" But it was *im-
plied*, " from various Branches of the Viſiatorial Power
" being expreſsly given to Him; from his having the In-
" terpretation of the Statutes; and from an expreſs Exclu-
" ſion of the Founder's Heir." Therefore it muſt be col-
lected from the *whole Purview* of the Statutes conſidered
together, " WHAT Power the *Founder* MEANT to give to
" the Viſitor."

Under theſe general Rules, I will now conſider the preſent Caſe as it ſtands upon the Statutes of this College.

The Foundation of this College is to be taken (as to *this* Queſtion) from the Statutes of Queen) *Elizabeth*: Which are the *now* governing Conſtitution of this College. Theſe Statutes *reſerve* to the Crown the *Legiſlative* Power: So that the Caſe of ALTERING *the Statutes* is certainly excepted; *if* ſuch Power *be included* in the Office of Viſitor. But where *a Body of Statutes has been given* by the Founder, I ſhould doubt extremely, " Whether a Viſitor *can*
" *alter* thoſe Statutes, or *give new* Laws:" (Whatever may have been the Notion in former Times.)

ALL OTHER Viſitatorial Power is given to the Biſhop of *Ely*, by the Statutes; and principally by the 2d Chap. De Electione Magiſtri, the 50th, De ambiguis interpretandis, And the 51ſt, De Viſitatore: (For the *Reſt* of the Statutes are leſs clear and explicit than theſe are, as to the Proof of this Point.)

His Lordſhip then went minutely through theſe three Statutes, and ſhewed that they gave the Biſhop of *Ely* the *general Power* of Viſitation: Which He *ſpecified* in many Inſtances, and particularly in the Words, " *Viſitationem*
" Collegij Epiſcopis Elienſibus *commendamus*."

In the Caſe of *Green* v. *Rutherforth*, in Chancery, 23d *May* 1750, Upon ſo much of theſe Statutes as was *then* ſhewn, Ld. *Hardwicke* gave his Opinion, " That the Biſhop
" of *Ely* was *general* Viſitor of this College; but that He
" could *not* make new Statutes; and if He ſhould attempt
" it, the Juriſdiction would *devolve* to the King's Courts,
" as in the *King* v. *Biſhop of Cheſter* the Caſe of *Mancheſter*
" College, *Paſch.* the 1ſt of his preſent Majeſty."*

* V. 2 Strange 707.

More Statutes are *now* ſhewn; but nothing ariſes from them, to vary this Conſtruction.

Nothing appears upon the *old* Foundation or the *other* Statutes, to impeach this Conſtruction.

The

* The Viſitatorial Power is almoſt as ſtrongly given Him by the Old Statutes as by the new: The Difference is, that in the new Statutes the Ambiguous Clauſe in Reſtraint of the Biſhop's Power, towards the End of the old Statute de Viſitatore, is * omitted. * P. 202.

What is there ſaid does not reſtrain the Power of the Biſhop of *Ely*, ſo ſtrongly as may at firſt Sight appear. *A. ante, 188. compated with 181.

The Meaning of the Proviſion ſeems to be, that he ſhall claim no Right AS *a Co-Founder*, though he was Owner of the Site; but only act as in other Colleges, *where he is not* Founder. And in Colleges where he is not Founder, He may act under Powers of Viſitation *delegated* to Him. However, be the Meaning as it may, this Clauſe is *totally omitted* in Queen *Elizabeth*'s Statutes.

This is *not* the Caſe of *Expulſion*; where the Maſter and four ſenior Fellows are to * conſent. The Power of *judging* and giving *Relief* upon *Claimants* and *Appeals*, is incident to the Office of General Viſitor: And if this Caſe related to one of the *old* Fellowſhips, the Statutes have laid the Viſitor under no Reſtraint, as to the Mode and Manner of exerciſing it. *V. ante, 181.

As *General* Viſitor therefore of this College (which I think clearly the Biſhop is,) He would certainly have Juriſdiction, if this Appeal related to One of the *old Fellowſhips*. Which brings me to the

Second Point—" Whether the Viſitor of an *old* Foundation, " has the *like* Power and Juriſdiction over a NEW ANNEXED " Foundation, as he has over the *Old* One."

It is a Queſtion of Extent and Conſequence.

In this College, there are 32 Original Fellowſhips; and 27, upon annexed Foundations.

I find that the *General Method* of *ingrafting* Fellowſhips, is by *Indenture* and *with a Clauſe of Diſtreſs*. I apprehend that this Method took its riſe from the old Tenures by Divine Service, (which differ ſomewhat from Tenures in Frank Almoigne;) where the Donor had a Power of Diſtreſs, of Common Right, when the Service was certain. (But this is only a Conjecture.)

I have procured Information, concerning *moſt* of the Colleges in *Oxford* and *Cambridge*; And I find that *moſt of the* OLD *Colleges*, in *both* Univerſities, conſiſt and are made up, (leſs or more,) of INGRAFTED Fellowſhips; and *ingrafted* BY INDEN-

* P. 203. * INDENTURES, too: And all theſe are conſidered as PART *of the old Body*; *Unleſs* there be any particular Exception, by the Terms of the new Foundation.

There was a Caſe (6th *July* 1740,) of Univerſity College in *Oxford* (founded by King *Alfred*;) where *Wm.* of *Durham* afterwards founded two Fellowſhips, "de proximis Dunelmiae Partibus." A Complaint was made to my Lord Chancellor, *as* GENERAL *Viſitor* of the College in Right of the King: And it was determined *againſt* the College. Yet *W.* of *Durham* had in that Caſe, *given* NO *Statutes Himſelf*: But theſe *ingrafted* Fellowſhips were conſidered as ſubject to the general Viſitor of the *old* Foundation. In *this* Capacity, Lord *Hardwicke* took Cognizance: And the College never made any Objection.

In the Caſe of the *Attorney-General* v. *Talbot*, which I mentioned before, The Counteſs of *Clare* was Foundreſs of *Clare-Hall*. One *Freeman* annexed a Fellowſhip *by Indenture*, (I don't obſerve there is any Clauſe of Diſtreſs in it.) The Conteſt was for one of *theſe* Fellowſhips. Lord *Hardwicke* held "That the Queſtion belonged to the *general* Viſitor "of the College; that *new* Fellowſhips ingrafted muſt be "ſubject to the Juriſdiction and Diſcipline exerciſed over the "*original* Foundation."

In the Caſe of Dr. *Green* v. *Rutherforth & al'*. (which I mentioned before,) both Lord *Hardwicke* and Sir *J. Strange* expreſsly laid it down, "That *new ingrafted* Fellowſhips, "if no Statutes were given by the Founders of them, muſt "follow the *original* Foundation, and be ſubject to the *ſame* "Diſcipline and Judicature."

I am ſatisfied that, upon mature Reflection, the College would tremble at the *Conſequence* of leaving every Election into any of theſe ingrafted Fellowſhips, or any other Diſputes concerning them, open to Courts of Law, and the Expence and Delay attending them.

I think clearly, that Dr. *Keton did* SO *conſider* and *intend* "that his new annexed Foundations SHOULD BE *ſubject* to "the old Statutes and Conſtitution of the College, in Caſe "he Himſelf ſhould happen to die without making any Or-"dinance by Will or otherwiſe." Theſe Fellows of his Foundation are to be elected *as* the other Fellows; and at the *Time* limited by the Statutes. They are to enjoy the *ſame Liberties*, *&c*, as the other Fellows. The Oath they were to take during the Life of Dr. *Keton*, "to obey ſuch "Statutes and Ordinances as ſhould be made by Him," is qualified with this Reſtriction, "*So that* the ſaid Statutes "ſhould be conformable with the Statutes of the *Foundreſs* "of

" * of the ſaid College:" Which neceſſarily implies that they were, in the firſt Place, to *obey* the Statutes of the Foundreſs of the College. * P. 204.

(He explained this, by many other Paſſages in the ſaid Indenture.)

Beſides, Eo NOMINE, the *ingrafted Fellow* becomes *ſubject and liable* to the Juriſdiction of the Viſitor *over the Fellows* of the College. Theſe *ingrafted* Fellows are exactly *the ſame* as all the *Reſt* of the Fellows, except as to the *Money* ariſing to them *from* the *New* Foundation; and are intitled to *all* the *like Privileges* as the *Old Foundation Fellows* are intitled to.

The Objection to the Biſhop's Right of viſiting in the preſent Caſe, ariſes from the Power of *Diſtreſs* here given for the Forfeiture, in Caſe the College do not obſerve certain Terms which are preſcribed to them.

But *ſeveral other ingrafted* Fellowſhips are juſt in the *ſame* Situation: And therefore it would go a great way, (in Point of Conſequence,) if, upon this Ground, We were to determine them NOT *to be Part* of the old Foundation.

Theſe are Proviſions DIVERSO INTUITU. And indeed the *Diſtreſs* would be a very INADEQUATE *Remedy*, to the *Perſon injured:* Nor is it even *given* TO *the Perſon injured*, but to *other* Perſons. So that it is manifeſt, that this Clauſe of Diſtreſs, given to the *Church of Southwell*, ought not to take away the SPECIFIC *Remedy from the* PERSON INJURED.

It ſeems to me very clear, that the Biſhop is as much Judge of *this* Complaint, as if it related to One of the *Old* Fellowſhips: And if it related to One of the *Old* Fellowſhips, I think the Juriſdiction of the Biſhop, as Viſitor, *moſt evident*. Therefore I am of Opinion, that the Cauſe ſhewn againſt this Rule is ſufficient; and it ought to be *diſcharged*.

Mr. Juſtice *Deniſon* concurred, in the whole, with Lord *Mansfield*.

He thought clearly, That the Biſhop of *Ely* was *General* Viſitor, except in the Inſtances particularly excepted.

No *particular technical Words* are neceſſary to create a Viſitor. And ſo was the Opinion of the Court, in Dr. *Snape*'s Caſe *H.* 2 *G.* 2. *B. R.* as well as in the Caſe of *Philips* v. *Bury*. And the main Buſineſs of a Viſitor, is to interpret the Statutes.

Now

*P. 205. * Now this *Deed*, though with a *Clauſe of Diſtreſs*, *cannot* take away the Authority of the Viſitor: It is for *another Purpoſe*. And Dr. *Keton never meant to exclude* his Scholars and Fellows from the *Benefit of an Appeal*, which the *other Fellows of the College enjoyed*. And *his* Fellows are ſworn *to obſerve* ALL *the Statutes of the College*.

The Diſtreſs is very little more than the *Form* of the Conveyance; and it is given to the *Church of Sauthwell* too: But ſurely it is *not an* ADEQUATE *Satisfaction* TO *the* REJECTED *Fellow*, who has a Right to be elected into the Fellowſhip.

The Viſitor has a Right to the Interpretation of the Statutes; and the ingrafted Fellow has a Right to appeal to Him. And the Clauſe of Diſtreſs does *not take it away* from Him. And there is no Manner of Reaſon why the *ingrafted Fellow* ſhould not have the *ſame Privileges*, as the *other* Fellows have.

I am ſo clear about this Matter, that I think there is no Reaſon for ſuffering the Party applying for the Prohibition to *declare* in Prohibition: But the Rule ought to be *diſcharged*.

Mr. Juſtice *Foſter* alſo concurred.

He took particular Notice of the 50th Chapter of Queen *Elizabeth*'s Statutes, about interpreting what might be ambiguous or obſcure. Which Statute, he agreed, does reſerve to the Queen a Power to add or diminiſh, reform, interpret, declare, change, alter, or diſpenſe, *&c*: *But the* DOCTRINALIS *Expoſitio* is expreſsly given to the *Biſhop of Ely*, in the very *ſame* Statute; and the College are thereby injoined, in virtue of their Oath, and under Penalty of perpetual Amotion, to ‡ obey his *Determination*, *Interpretation*, and *Declaration*.

‡V. ante, 185.

He declared that He had no Doubt that the *General* Power of Viſitation *is* given to the Biſhop: And He ſaid, He ſaw no Inconſiſtency in the Statutes. As to the Clauſe of *Diſtreſs*—That would give no Sort of *adequate Satisfaction* to *this* REJECTED *Fellow*; who comes for a *ſpecific Remedy* for the Injury done to him. Therefore He declared his Concurrence with Lord *Mansfield* and Mr. Juſtice *Deniſon*.

‡N. B. Mr. Juſtice *Wilmot* was not preſent at any one Part of this Motion; being engaged in the Court of Chancery (as one of the Lords Commiſſioners,) during the whole of it.

And *Per Cur.* ‡ unanimouſly

The RULE was DISCHARGED.

Earl

† Earl of Bath *verſ.* Abney, Spinſter.

† Page 206. Friday, 4th February, 1757.

A Caſe out of Chancery, for the Opinion of this Court.

The Queſtion was, Whether an Executor of a COPYHOLDER *for* a TERM OF YEARS, was obliged to be *admitted*; (and, conſequently, liable to *pay a Fine* upon ſuch Admittance.)

The Manor in which the Lands lay, was *Stoke Newington*, in *Middleſex*; the Defendant, Mrs. *Abney*, is Lady of this Manor; the Premiſſes demiſed, were 60 Acres of Meadow, let at 125l. per Annum.

The State of the Caſe was pretty long and particular; but the Queſtion was ſhort; *viz.* "Whether an EXECUTOR "*of a Tenant for* YEARS, coming into the Copyhold, as a "Chattel Real, under his Teſtator's Will, is obliged to be "*admitted.*" (For the Counſel for the Plaintiff, acknowledged that the being liable to a *Fine* would *conſequently* follow a Neceſſity of Admittance: That is to ſay, they admitted that *if* he was *compellable* to come in and be admitted, he would alſo be compellable to pay a Fine.)

The full State of the Caſe was in Subſtance this—

That *Henry Guy* being ſeiſed in Fee of 60 Acres of Meadow in the Manor of *Stoke Newington*, let at 125l. *per Annum*, the ſaid *Henry Guy* ſurrendered the ſame to the Uſe of his Will: And having ſo ſurrendered (in a proper Manner) to the Uſe of his Will, He died ſeiſed in Fee, having firſt duly made his Will and thereby deviſed to *John Taylour* and *Arthur Lake* their Executors and Adminiſtrators for 99 Years, if three Perſons (in his ſaid Will named) or any of them ſhould ſo long live; upon ſeveral Truſts, *viz.* firſt, to the Uſe of the preſent Earl of *Bath*, for Life; then to his Iſſue Male, (*viz.* firſt and other Sons, *&c.*) in ſtrict Settlement; then in the like Manner, to the Uſe of the Earl's Brother, General *Pulteney*; then to the late Mr. *Daniel Pulteney*, in like Manner; then to the Uſe of the Earl of *Bath* in Fee. And after the Death of the ſaid Teſtator, the ſaid *Taylour* and *Lake*, the Truſtees, claimed to be admitted *according to the Tenor of the Will:* [*V.* poſt. 213.] and were thereupon admitted according to the Cuſtom of the ſaid Manor; did Fealty; and *paid a Fine of* 280l. to the then Lord of the Manor, on ſuch Admittance.

† Page 207. † One of the three Lives is ſince dead; the other two, Living; And both of the ſaid two Leſſees, *John Taylour* and *Arthur Lake* are dead; but *John Taylour* ſurvived *Lake*. *Taylour* the ſurviving, (but now deceaſed) Leſſee, appointed Dr. *John Taylour* and Another Perſon his Executors; and Dr. *Taylour* is now the ſurviving Executor of *John Taylour*, the Original and Surviving Co-Leſſee.

Mrs. *Abney* is now Lady of the Manor.

It did not appear to the Lord or Lady of the Manor, that the Leſſees, *Taylour* and *Lake*, were dead, till 1752: When this Fact was found by the Homage.

Then the Executor of the Survivor, (which was Dr. *John Taylour*, the ſurviving Executor of the ſaid *John Taylour* the original Co-Leſſee) was ſummoned to come in, and be admitted; the Jury having found that the original Leſſees were both dead: And Proclamations iſſued *&c.* [*N. B.* The Proclamation was for the *Heir* of *Taylour* or other Perſon claiming, *&c.* to come in, *&c.*]

It is ſtated, that the General Cuſtom of the Manor is to grant the Copyholds for Life, or in Fee; and that No *other Inſtance* of a *Grant for Years*, beſides the preſent Inſtance (now before the Court,) has been known in the ſaid Manor of *Stoke-Newington*.

The Caſe further ſtates, that *Fines* have been uſually paid *upon Admiſſion*; and that the uſual *Rate* of ſuch Fine has been one and an half Year's improved Rent of the Premiſſes to which the Tenant is admitted.

And by the Uſage of this Manor, the Fine uſually taken for two Lives, is as much *and* half as much, as the Fine for one Life: And the Fine uſually taken for three Lives, is as much *and* half as much, as the Fine for two Lives.

The two Queſtions made upon this Caſe, and ſent to this Court for their Opinion upon them, were 1ſt. Whether the ſurviving Executor of *John Taylour* (the ſurviving Truſtee of the *Term* for 99 Years) ought to come in, *to be admitted* Tenant of the Copyhold Premiſſes in Queſtion: 2dly. In Caſe he ought, then Whether the Lady of the Manor will be intitled to any FINE upon ſuch Admittance.

This Caſe was twice ſpoken to, in this Court: firſt, on *Tueſday* 18th *May* 1756, by Mr. *Pratt* for the Plaintiff, and Mr. *Sewell* for the Defendant; and a ſecond Time, on *Friday*

‡ *Friday* 4th *Feb.* 1757, by Mr. *Norton* for the Plaintiff, and ‡ P. 208.
Mr. *Gould* for the Defendant.

And the two Queſtions being reduced into one, as is abovementioned, (it being agreed " that if the Executor was compellable to be admitted, he would conſequently be liable to " a Fine :")

It was argued on the part of the Plaintiff, the Earl of *Bath*, That the Fine becomes due to the Lord (or Lady) of the Manor, upon every *Change of the Eſtate* ; not upon the *Change of the Tenant*, where there is *no* Change of the Eſtate.

For where there are ſeveral Remainders, to ſeveral Perſons, the *Admiſſion of the firſt Taker* is the Admiſſion of *every* Perſon in Remainder. 4 *Co.* 22. *b. Copyhold Caſes* ; and 4 *Co.* 23. *a.* Caſe the 6th. *Cro. Eliz.* 504. *Gyppyn* v. *Bunney*. *Kitchen* 122.

And here, *Taylour* and *Lake* were admitted *according to the Tenor* of their Teſtator's Will : Which muſt have been to the *whole Eſtate* comprized in the Will. And therefore the *Fine* muſt have been *proportionable* to the Value of the *whole* Term of 99 Years : And 'tis againſt Conſcience that the Executor of the deceaſed Leſſee ſhould pay *another* Fine for the *ſame* Eſtate. Neither is He compellable to come in and be admitted afreſh ; it being the ſame Eſtate.

And that *no* freſh Admittance is neceſſary, nor any *farther* Fine payable, appears from the Caſe of *Dell* v. *Higden* in *Moore* 358. and the Caſe *Tiping* v. *Bunning*, *Moore* 465. In both which Caſes it was holden and reſolved " that the Admittance of a Tenant for Life, of a Copyhold, is an Admittance of Him in Remainder ; and that no new Fine is " due from him in Remainder ;" And in *Cro. Eliz.* 504. *Gyppyn* v. *Bunney* (which is S. C. with *Moore* 465.) *Popham* and *Fenner* held accordingly ; and that, becauſe They have but One Eſtate in Law : And they held that ONLY *One* Fine is due ; which the firſt Taker ſhall pay.

In 3 *Lev.* 308. The Caſe of *Barnes* v. *Corke*—*Tr.* 1 *W.* & *M. in C. B.* It came directly in queſtion : And Ld. *Coke's Dictum* in 4 *Rep.* 23 *a.* was taken into Conſideration, and explained to be reſtrained to SPECIAL Cuſtoms only : But the *general* Principle of Law was ſettled to be, " That NO *Fine* is due to " the Lord, from the Remainder-Man, *without* a *ſpecial Cuſtom* for it."

And the Reaſon is, (as *Popham* ſaid, in the Caſe of *Gyppyn* v. *Bunney*,) " becauſe Both have but one Eſtate in Law, " And the Lord has already admitted to the *whole* :" Which Reaſoning is quite applicable to the preſent Caſe.

† P. 209. † If a Copyholder in Fee grants his Copyhold upon Condition, and enters for the Condition broken; There ſhall be no freſh Admittance, nor Fine; becauſe he is *in ſtatu quo prius*. *Coke's Complete Copyholder*, *ſ.* 56. So, if there be two Joint-tenants, and one die; the Survivor needs no Admittance, nor ſhall pay a Fine. *ibidem*. So the Widow of a Copyholder, for her Cuſtomary Free-bench; becauſe 'tis Part of the Old Eſtate, and is caſt upon Her and veſted by Law.

So it is alſo in Dower, and Tenancy by Curteſy; though there a *new Tenant* intervenes.

Noy 29. *Rennington* v. *Cole*, is full in Point. Alſo *Hutton* 18. *Jurden* v. *Stone*, S. C. *Hob.* 181. *Howard* againſt *Bartlet*, S. P. 2 *Dunv.* 184. Title *Copyhold*, Letter M. *pl.* 1. in Point. *Cro. Jac.* 573. *Waldoe* v. *Frances Bartlet Wid.* S. C. with *Hob.* 181. [but not this ſame Point.] 2 *Ro. Rep.* 178. *Walter* v. *Bartlet*, S. C. It is conſidered only as an *Excreſcence* out of the Original Eſtate, by Ld. *Hobart*, *pa.* 181. And an Executor of a Copyholder for *Years* is within the ſame Reaſon; For 'tis only the *Old Eſtate* continued.

But the Caſe of Descents may be objected: For there the Estate is the *ſame*; Only the Tenant altered.

Now it may be difficult to enter into the true Reaſon of this. But it may be conſidered as a Change of *Eſtate*; and as a new Grant: The Lord gave a new Admittance, a new Grant.

But perhaps that Caſe of Deſcents may be an *Exception* from the General Rule.

There are ſeveral Caſes in Point, for the Plaintiff: And no Authority againſt Him, except *Weſton*'s Opinion in *Dedicott*'s Caſe. *Dedicott*'s Caſe itſelf, in 3 *Leon.* 9. is moſt expreſs in Point: And *Dyer* 251. is S. C. [But *Dyer* does not mention this Point at all.] The Wife's Intereſt was there a Chattel-Intereſt: And She was to have it for 16 Years: And her ſecond Huſband, who ſurvived her, had it as her Aſſignee, *without* paying any Fine, or being admitted. And in 3 *Leon.* 9. *Brown* and *Dyer* put the very preſent Caſe in Terms, of an Executor of a Copyholder for Years; and agreed that He ſhall have the Term *without* Admittance. And the Caſe of *Otlery* Monaſtery, in 1 *Leon.* 4. and 4 *Leon.* 118. S. C. (twice printed, *verbatim* alike, almoſt,) mentions a Determination of the preſent Queſtion, in Point: Agreeable to which, is another Report of it, called *Heydon*'s Caſe, in *Moore* 128. S. C. *Egerton*, in his Argument, of that Caſe of *Otley*, vouches a Caſe as determined in 8 *Eliz.* in *C. B.*

Which

‡ Which Case is expresly in Point with Us. But the Case ‡ Page 210.
itself, of 8 *Eliz.* in *C. B.* which he so cites, is not to be found. 2 *Danv.* 190. Letter Y, mentions S. C. *Sheppard*'s *Court-Keeper*'s *Guide*, 5th Edit. *pa.* 126. And *Calthrop*'s *Readings on Copyholds*, 2d Edit. *pa.* 67. is expres in Point: And so again in *pa.* 72. Tenant in Dower and Freebench. *Tenures* 272, 273. S. P. accordingly: (the Book of Tenures that has no Name to it.) And *Comberbach* 445. expres "that the Exe-"cutors of a Termor for Years of a Copyhold shall pay *no* "Fine for Admittance."

They said that the Case of *Dell* v. *Higden* in *Moore* 358. was but a loose Note: And *Cro. Eliz.* 372, which is a Report of the very same Case, does not mention any such Question in it.

And as to what was cited out of the Case of *Gyppyn* v. *Bunney*, *Cro. Eliz.* 504. and *Moore* 465. They said it was no more than a Dictum of *Popham*'s.

Then, *if* the Executor is *not* obliged to be *admitted*, No *Fine* is due: For no Fine is due, *but upon Admittance.*

But the Inconvenience may be objected, "That a Lord "may be stripped of his Inheritance, by Copyholder's sur-"rendering for *long* Terms (as even for a Term of 1000 "Years.") And so the Lord might lose his Fines.

But 1st. This Inconvenience does *not really* exist at present: And 2dly. The Lord might in *such* Case *refuse* to admit: And could not be forced to it, either in Law, or Equity.

2 *Bulst.* 336. *Foorde* v. *Hoskins* proves, "that the Copy-"holder cannot bring an Action at *Law*." [It is a most expres Determination in Point.]

And in *Equity*, they would not assist the Copyholder in *such* an Attempt. *Comberb.* 445.

The present Case is a Lease to *Two* Persons, for 99 Years, determinable upon 3 Lives: In which, the Fine might easily, in *Fact*, be settled by a *proportional Computation*, if it could be done *by Law.*

The Copyholder derives his Estate, *not* from the Lord, but from the *Custom* of the Manor: For a Lord who is only Tenant for Life, may admit in Fee.

And "that the Lord would *not be bound*, either in Law or "Equity, to admit, upon a Surrender by a Copyholder in "Fee,

‡ Page 211. " Fee, for 1000 Years," *Comberb.* 445. ‡ expreſsly proves; And *alſo* proves " That in ſuch a Caſe, an Executor ſhall " pay NO *Fine* for Admittance:" Which, it muſt be ſuppoſed, was taken down by the Reporter, as Lord *Holt*'s Opinion. [* This is no part of the Caſe of *Sandwell* v. *Sandwell*; but manifeſtly, a quite diſtinct Caſe; probably, at *Niſi prius*.]

The Lord's Intereſt in his Fine is ſacred: An Act of Parliament ſhall not be conſtrued ſo as to deprive Him of it. [*V. Manwood's Diverſity*, in *Moore* 128.]

It would be very hard on our Side, if one and an half Year's Rack Rent was to be paid upon every Change of an Executor.

Therefore they prayed a Certificate in the Plaintiff's Favour.

On the Part of Mrs. *Abney*, Lady of the Manor, It was agreed, that, in this particular Caſe, the Fine and the Admittance muſt depend on *each* other; i. e. that *either Both* might be required, *or neither could*.

But it was ſaid that the Reaſon of Admittance, in general, depends upon the Relation that ſubſiſts between Lord and Tenant: And that the *Admiſſion* of the Tenant, in theſe Caſes, was *perſonal* to the Tenant Himſelf only; And the *Eſtate* depended upon the Will and Pleaſure of the Lord. He might originally, admit *whom he pleaſed*, on the Deceaſe of a Tenant. Indeed, at length, a *Sort of Claim* in the Heir at Law, to ſucceed to his Anceſtors, became eſtabliſhed by *Cuſtom*. However, a *great deal* STILL *remains* in the Lord's Power and Diſcretion: And the Tenure is ſtill (ſtrictly) at the *Lord's Will*.

It was always neceſſary that the new Tenant ſhould *perſonally appear*: And it ſo remains ſtill, to this Day; He muſt pay his Fine, and do Fealty *in Perſon*. *Co. Copyholder*, *f.* 19. and 4 *Rep.* 22. *b.* &*c.* to the like Effect.

And they forfeit if they grant Leaſes without Licence. 4 *Co. Copyhold Caſes*. 9 *Rep.* 76. *a. Combe*'s Caſe.

And they muſt be Perſons *capable* of being admitted: For it is impoſſible to admit One who is *incapable* of Admiſſion.

Now *No Man* is Heir or Executor to the Tenant *during* the Tenant's Life. Therefore the Thing itſelf is impoſſible, " that the Admiſſion of the firſt Tenant ſhould be an Ad- " miſſion *of* THEM *alſo*, *as* Heir or Executor to ſuch firſt " Tenant."

" The

‡ " The Change of ESTATE, and *not* of Tenant, cannot ‡ P. 212.
" be the *true Ground* of the Fine to the Lord." For that Notion would let in many Inconveniences: And it would be moſt unreaſonable that One *ſingle* Fine to the Lord ſhould anſwer to *all* Changes of the Tenant.

The Remainder-Man may be Tenant for *One* Purpoſe; *Not* for another. *Co.* 4. *Rep.* 23. *a. b.*

Admittance *precedes* the Fine; and is the *Cauſe* of it. It is neceſſary, in order to intitle the Lord to a Fine. And this appears to be the Senſe of the Legiſlature, by 9 *G.* 1. *c.* 29. " An Act to enable Lords of Manors more eaſily to recover " their Fines, *&c.*" And upon Admittance, a Fine is due. And 1 *Mod.* 102. & 120. *Blackburn* v. *Graves* proves that the Lord ſhall *ſtill* have his Fine; *although* the Admiſſion of the particular Tenant *be* the Admiſſion of the Remainder-Man. It does not follow, that becauſe the Eſtate is *veſted*, therefore there ſhall be *no* Admittance or Fine: For upon *Deſcents*, (where there is no doubt but that a Fine is payable,) Yet the Eſtate *is undoubtedly veſted in the Heir.* And *Coke*'s *Complete Copyholder f.* 56. * *pa.* 63, is expreſsly in Point " That he in Remainder ſhall be admitted, *and pay* a Fine; " *although* his Eſtate was veſted by the Admittance of the Te- " nant for Life."

In the Caſe of *Barnes* v. *Corke*, 3 *Lev.* 308. The principal Queſtion they ſaid, was upon the *Forfeiture*; and that the other Points were only * *incidental.* [But the 1ſt Point was (in Terms) " Whether a Fine was due."]

In the Caſe juſt now mentioned, ſtiled *Batmore & Ux'* v. *Græves*, in 1 *Ventr.* 260. Or ‡ rather *Blackburn* v. *Græves*, ‡ V. 3 Ke. as it is called in 1 *Mod.* 102 & 120. S. C. It was determined ble 263, " That the Admiſſion of Tenant for Years was an Admiſſion 329. S. C. " of him in Remainder, and occaſioned a *Poſſeſſio Fratris:*" And it is there reſolved, that the Admiſſion of the Tenant for Years, though it is an Admittance of Him in the Remainder, yet ſhall *not prejudice the Lord*, as to the Fine from the *Remainder*-Man. And 1 *Ventr.* 260. is expreſs and plain, " That " the Remainder-Man *muſt pay a Fine*, *when* his Eſtate comes " *in Eſſe.*"

Indeed, where the WHOLE Fine *has been already* PAID to the Lord upon the *firſt* Admiſſion, there is no Reaſon why it ſhould be paid *over again:* And the Remainder-Man is in Fact admitted, in *ſuch* Caſe. But where the Fine is not paid for the WHOLE, upon the *original* Admiſſion; there, the Remainder-Man muſt *pay* a Fine, and muſt be admitted.

* P. 213. * admitted. [*V.* 1 *Vent.* 260. and 1 *Mod.* 120. where this Matter ſeems to be put upon a right and reaſonable Foot.]

If the Remainder-Man dies during the Life of the Tenant for Life, *his Heir* ſhall be admitted and muſt pay a Fine. Therefore the Payment is for Lives *in being*; And the Fine is payable upon the Change of the *Tenant*: And the Admittance does *not extend* beyond the PERSONS of the Tenants admitted. They are *ſtill* only Tenants at WILL. *Co. Copyholder*, *ſ.* 14. *ſ.* 32. *ſ.* 41. expreſsly. 4 *Rep.* 22. *b.* S. P. in Point accordingly. And the Eſtate is only veſted in the Tenant *perſonally*.

In the preſent Caſe, The Perſons originally admitted, prayed to be admitted "*according to* the Tenor of the Teſ-"tator's Will;" and it was granted to them, according to the Cuſtom of the Manor: There is nothing ſaid of their *Executors*. And they were admitted *as Truſtees*, and not for their own Benefit: And their Admiſſion was only *perſonal*.

The Admittance of an *Heir* is very different. *Compleat Copyholder*, *ſ.* 41. 4 *Rep.* 22. *b.*

The *Heir* has very conſiderable Intereſt, *before* Admiſſion. Yet *he* muſt be admitted.

As to Tenants *pour autre vie*, they ſhall be admitted, and pay Fines. *Co. Copyholder*, *ſ.* 56.

All who allow of a *general* Occupation, ſay *he* muſt be admitted; And there is no Doubt but that a *Special Occupant muſt* be admitted and pay a Fine.

Wherever a Right is transferred, upon *Death*, there muſt be an Admittance.

A Termor may die *Inteſtate*, and have *no* Adminiſtrator; Or may make a Will, and the Executor *renounce*: And ſhall the Lord have *no* Tenant? Surely, in theſe Caſes, the Lord ſhall not be *without* ANY *Tenant at all*.

An *Aſſignee* of a Term ſhall pay a Fine; So, a *Deviſee* of a Term; Indeed *every new Tenant* ſhall pay: A *Mortgagee*; An *Aſſignee* of a Bankrupt; the *Heir of the Aſſignee*; In ſhort, *Wherever* there is a *Change of* TENANT.

If it depended upon the Change of *Eſtate* only, an Eſtate *in Fee* would never pay.

Dedicott's

* *Dedicott's* Caſe is ſtrong for the *Defendant*. *Page 214.

Dyer 251. explains 3 *Leon.* 9. The Huſband, it appears by *Dyer*, was not the Perſonal Repreſentative of his Wife: For ſhe had an Adminiſtrator appointed by the Ordinary. In 3 *Leon.* 9. there was, *as* he reports it, an *Obiter Dictum* of two Judges indeed; but contradicted by another. In *Dyer* it appears that the Huſband held in, in Right of his Wife; And the Diſpute was between the Wife's Adminiſtrator and the Huſband. The Huſband was poſſeſſed jointly with the Wife, on his Marriage; and He only *continued* in Poſſeſſion. *Executors* may be conſidered *as Aſſignees*, (the rather as Copyhold Eſtates are not Aſſets:) But the Huſband could not in this Caſe of *Dedicott*, be conſidered as Aſſignee. In 5 *Rep.* 18. *a.* Lord *Coke* cites 29 *E.* 3. 48. and 30 *E.* 3. 14. *Simpkin Simeon's* Caſe: By which it appears "that the "Baron is *not Aſſignee* to his Wife;" In *Dedicott's* Caſe, there was *no Tranſmiſſion* of Eſtate. It is like the Caſe of *Joint-tenants*; where the Survivor ſhall not pay. *Co. Copyholder*, §. 56.

Calthrop's Reading, 67. is plainly the ſame Caſe with 3 *Leon.* 9. and *Dyer* 251. *Hauchet* v. *Roſe*; As appears by the Margin of *Dyer*, and by the End of the Caſe itſelf too. It is only a Scrap out of *Leonard*.

As to the Caſe of *Otlery* Monaſtery, reported in *Moore* 128 and in 1 *Leon.* 4. and 4 *Leon.* 117. (S. C. in Terms) and the Caſe of 8 *Eliz.* there cited by Mr. Solicitor General *Egerton*; there was no Queſtion between Tenant and Lord: And *Egerton* plainly means *Dedicott's* Caſe, and the Dictum there mentioned. For *Dedicott's* Caſe was in *C. B.* and was in 7 *Eliz.* according to 1 *Leon.* 9. and *H.* 8 *Eliz.* according to *Dyer*.

As to *Noy* 29. *Rennington* againſt *Cole*—The Cuſtom of the Manor was for the Wife to hold *durante Viduitate:* And the Wife's Eſtate *durante Viduitate* was "but a *Branch* of the "*Huſband's Eſtate*," *(as is rightly there ſaid Hobart.)*

As to *Hob.* 181. The Caſe of *Howard* v. *Bartlet*,—The ſame Cuſtom is ſtated: And the Huſband's Eſtate was holden not to be merged; And the laſt mentioned Caſe, of *Rennington* v. *Cole* was there taken Notice of and cited by Lord *Hobart*.

As to *Comberb.* 445. it is a mere ſhort, looſe, *Niſi-prius* Note: Neither the Book itſelf, nor this Note in it, are of any Authority. And *non conſtat whoſe* Opinion it is, that the Note mentions. If it were good Law, it would render

All

‡ P. 215. All Family-Settlements ineffectual: ‡ For he asserts "That "the Surrender may be for a thousand Years, and that "the Executor shall pay no Fine." At this Rate, the Granting Copyholds for Terms of Years would be, in Effect, infranchising them.

We are not now upon any *special* Custom of a Manor; but upon the GENERAL *Custom of Manors:* Therefore the Cases upon *particular* Customs are not applicable to the present. The Collateral Qualities of Dower, Freebank, &c, are not incident to Copyholds; but depend upon Special Customs. In *this* Manor, the Fines are uncertain: But 1 and ½ Years Value of the Nett Year's Rent has been *generally* taken, for One Life; 2¼ Years, for two Lives; And for 3 Lives, half as much more.

And Regard ought to be had to the Fine paid on the last Admittance.

This Estate was of the Value of 125*l. per Ann.* when the two Tenants *Taylour* and *Lake*, the first Lives were admitted; And the Fine paid (*viz.* 280*l.*) ‡ answers to the two Lives admitted, according to the abovementioned Rule: And the Length of the Term is of no Consequence. *These two* Persons therefore were the Tenants: *After their* Death, The Lord has *no* Tenant: It makes no difference, Whether the Admittance be for *Lives*; or for a Term of Years *determinable on Lives.*

	l.	s.
‡ 1 Year	125	0
½ a Year	62	10
1 Year & ½	187	10
¾ of a Year	93	15
2 Yrs. & ¼	281	5

Upon the Usage stated on this Case, a proportionable Sum is to be paid for a Fine, according to the Number of Lives. And this is a just Rule, and the best Rule: And it is better to keep to *this* Rule, than to form a *new* Rule, upon a Suit in Equity "to compel the Lord to admit."

The Point turns merely and entirely upon the Change of *Tenant.* If it were otherwise, Lords of Manors, nay even jointured Ladies of Manors, might make voluntary Grants, and incumber their Posterity, *ad libitum.* The Lady of *this* Manor is Lessee under a Prebendary: And Consequently, such Lessee (though she were only so for one Year) might admit for 500 Years, without any Fresh Fine, upon *their* Principles; and so *defraud* the original Owner of the Manor in Fee. It would take it out of the restraining Statutes of Queen *Elizabeth.*

The first Admission was in 1709; [*viz.* the Admission of the two Lives who were admitted according to the Tenor of the Testator's Will.]

REPLY,

‡ REPLY, on the Part of the Plaintiff. ‡ Page 216.

The Diſpute between us is "*Upon* WHAT *Principle, Fines* "*are due* to the Lord."

They ſay, "On the Change of *Tenant:*" We ſay, "On "the Change of *Eſtate*, only."

They argue the Admittance to be *perſonal*; And urge it, from the doing *Fealty*, at the Time of Admiſſion.

We agree, this was ſo *originally:* But We ſay the Admittance is not always perſonal, *now*. The Caſes of Dower, and of Tenant by Curteſy prove this: For *neither* of *theſe* Tenants appear perſonally, or do Fealty. And the Caſe of *Barnes* againſt *Corke*, in 3 *Lev.* 308. alone proves the ſame Thing.

And Ld. *Coke*, in his *Copyholder*, agrees "that the *Heir* "would not need to be admitted, if it were not on Account "of the Lord's Fine.

And all the Remainder-Men are admitted under the original Admittance, *till* a Deſcent: But We agree that *Whenever* a DESCENT happens, the Lord *ſhall* have a Fine.

The gradual Diminution of Fines, on admitting for ſeveral Lives, ſeems to ſhew that only one Fine is due; And that that Fine is payable on the *firſt* Admiſſion.

The Caſe of an *Occupant pour autre vie*, is a NEW *Eſtate:* For the old Eſtate is gone; though the Grantor is *eſtopped* to take againſt his *own* Grant, (which extended beyond the Life of the Grantee himſelf.)

As to the *Aſſignees of a Term*—He can only come in by Surrender and Admittance: Which is a *new Eſtate*; And he can have *Nothing* TILL *Admittance*.

So, in Caſe of a *Mortgage*, The Mortgagee comes in *under a Surrender:* Which makes a new *Eſtate*.

So, in Caſe of an *Aſſignee of a Bankrupt*. And the Act of Parliament of King *Jac.* 1. requires the Aſſignees coming in thus: It takes expreſs Care of the Lord's Intereſt. [*V.* 13 *Eliz. c.* 7. 1 *J.* 1. *c.* 15. 21 *J.* 1. *c.* 19. and alſo *Co. Copyholder*, §. 56. *pa.* 62. at the very Bottom.]

The Caſe of a *Deviſee*, is likewiſe undoubtedly a *new* Eſtate.

And

‡ Page 217. ‡ And in Case of the Executor's renouncing, or of no Administration being taken out, still the Lord will *not lose* his Fine.

In Case of a Woman's *Free Bench*, there is a Change of *Tenant*. So in a Tenant *by Curtesy*'s Case.

As to the Case in *Dyer* 251. the Husband is a *new Tenant*, 'tis true: But the *Estate* is the *same*.

Just so here, in the Case of an *Executor*, the ESTATE remains the *same*.

Probably the Case mentioned by Mr. *Calthrop is* the same Case with that in *Dyer*. But still Mr. *Calthrop*'s *Opinion* stands uncontradicted: And it is confirmed by Lord Ch. J. *Holt*'s Dictum, and by the *Tenures*, and by *Danvers*. [*V. ante* 210.]

As to the *Quantum* of the Fine—They say the original Fine was taken *only* as an Equivalent for *two* Lives; and that therefore *another* ought now to be paid, as an Equivalent for a third.

[*N. B.* The Fine for 2 Lives, is the Sesqui of that taken for One: and the Fine for 3 is Sesqui of that taken for Two; by the Usage of this Manor. *V.* ante 207.]

But the Fine usually taken in this Manor, where a third Life is added to two former ones, is *only* the Fine upon two Lives, *and* HALF *as much more*.

Whereas they *now* demand a WHOLE Fine: And they might just as well demand it, if only a few Years of the Term remained unexpired.

As to the *Inconveniences*, The Lord *cannot* be compelled to admit, either by Law, or in Equity, without the Tenant's paying a reasonable Fine to the Lord.

And a *temporary* Lord *can never infranchise* the Tenants Estates, *by Collusion*: For that would be a VOID *Grant*, and would be considered as a *voluntary* Admission, which would not prejudice the Capital Lord.

This is owing to the Modern Fashion of introducing long Terms, unknown to our Ancestors and to our old Law: Which none but the Parliament can change.

Perhaps it would be no bad Policy, if *All* Copyholds were infranchised. However, though a Lord *may* grant a Copyhold for a Term of Years, Yet He is *not compellable* to do so: It is voluntary; the Lord is NOT *obliged* to admit for *Term of Years*.

Here,

* Here, They are admitted " *according to the Tenor of* * P. 218.
" *the Will:* For *ſo* they pray it: And their *Prayer is granted.* [*V. ante* 206.]

The Law is clear, " That *no Admiſſion* of the Remaind-
" er-Man is neceſſary."

And there are no Inconveniences attending ſuch a Determination, but what the Lord himſelf may obviate.

The COURT took Time to adviſe; and after adviſing, to certify.

And, about a Fortnight after the end of this Term, they gave their Certificate: Which is here ſubjoined.

N. B. What is ſaid by *Hales* and *Wylde*, in 1 *Mod.* 120, and 1 *Vint.* 260: Seems to be the Juſtice of the Caſe.

The OPINION of the Court of King's Bench on the Caſe ſtated, upon the following Queſtions, *viz.*

1ſt. Whether the ſurviving Executor of *John Taylour*, (the ſurviving Truſtee of the Term of 99 Years,) *ought* to come in, to be *admitted* Tenant of the Copyhold Premiſſes in Queſtion?

2d. In Caſe he ought, Whether the Lady of the Manor will be intitled to any *Fine* upon ſuch Admittance?

Having heard Counſel on both Sides, and conſidered of this Caſe, We are of Opinion " That the ſur-
" viving Executor of *John Taylour*, (the ſurviving
" Truſtee of the Term of 99 Years,) OUGHT *to come*
" *in to be admitted* Tenant of the Copyhold
" Premiſſes in Queſtion; and that the Lady of the
" Manor WILL *be intitled to a Fine* upon ſuch Ad-
" mittance."

MANSFIELD.
T. DENISON.
M. FOSTER.
J. E. WILMOT.

24th *February* 1757.

Sir

‡ P. 219. ‡ Sir John Trelawny Bart. *verſ.* Biſhop of Wincheſter.

Saturday 5th February 1757.

Hil. 26 *G.* 2. *Roll.* 868.

(Lord Commiſſioner Wilmot *abſent in Chancery.)*

IT was an Action of Debt for 600*l.* for 5 Years Salary of ſeveral Offices, *Great or Chief Steward to the Biſhoprick*, and all its Caſtles Lordſhips Manors &c; and *Conductor of the Men and Tenants of the Biſhop thereof*; with a Salary of 100*l. per Annum*; and of Maſter *Keeper or Preſerver of the Wild Beaſts in all the Foreſts, Parks*, Chaſes and Warrens belonging to the Biſhop, and Chief Governor of all Birds Fiſh and Beaſts of Warren &c, (commonly called *Chief Parker*;) with a Salary of 20*l. per Annum:* Which Offices and Salaries were granted to the Plaintiff by Sir *Jonathan Trelawney* Bart. late Biſhop of *Winton*, by Letters Patent, with Clauſe of Diſtreſs if unpaid.

¶ See the laſt Clauſe of that Statute: Which he pleads verbatim, as infra 220 and 221.

The Biſhop pleads the ¶ Statute of 1 *Eliz. c.* 19. And alſo that the Offices aforeſaid are *not ancient* Offices of the Biſhoprick, *nor were uſually granted for Life*; and that the ſaid Fees are *not the ancient Fees*; and that the ſaid Offices are *uſeleſs and merely nominal*, and *no Duty or Service* to be done for or in reſpect of them; And that the Grants are Grants of Hereditaments Parcel of the Poſſeſſions of the Biſhoprick, &c.

The Plaintiff replies That they *are ancient* Offices; and the Fees, the *ancient Fees*; and that they have been *uſually granted for Life: abſq*; *hoc* that they are *uſeleſs and merely nominal.*

The Biſhop rejoins that the Offices *are uſeleſs and merely nominal*; and without any Duty or Service to be done for or in reſpect of them; in Manner and Form as &c. And Iſſue is joined thereon.

The Special Verdict finds, That the Offices of *Chief Steward*, and of *Conductor* of the Men and Tenants of the Biſhoprick, ARE ANCIENT *Offices* of the Biſhops; and HAVE *been* ANCIENTLY AND USUALLY *granted for Life*, with an Annuity; and that the Annuity of 100*l.* IS *the* ANCIENT FEE.

That the ſame were granted to the Plaintiff, by *Jonathan* late Biſhop of *Wincheſter*, on the 4th of *July* 10 Q. *Anne:* Which Grant was *approved* by the Dean and Chapter, and *confirmed* by them.

That

‡ That the Plaintiff thereby became ſeiſed, and is ſtill ſeiſed thereof; and RECEIVED *the Annuity* during the Life of *Jonathan* late Biſhop of *Winton* (the Grantor) and of his Succeſſor *Charles* (*Trimnell*,) and of his Succeſſor *Richard* (*Willis*,) and alſo *during the* FIRST ELEVEN *Years* of the *preſent* Biſhop's Time (Dr. *Benjamin Hoadly*:) And that five Years Annuity, ending at *Michaelmas* 1751, remains unpaid. ‡ P. 220.

Then they find (verbatim) the * private Statute of 1 *Eliz.* c. 19. [See *Moore's* Reports 107: and *poſt.* 221.] By the laſt Clauſe of which Act, "All Gifts, Grants, &c. made by any "Arch-Biſhop or Biſhop, of any Honours, Caſtles, Manors, "Lands, Tenements, OR OTHER *Hereditaments* being Part "of the Poſſeſſions of his Arch-Biſhoprick or Biſhoprick, "or united *appertaining or belonging* to any the ſame Arch-"Biſhopricks or Biſhopricks; to any Perſon or Perſons, "Bodies Politic or Incorporate, (Other than to the Queen's "Highneſs her Heirs and Succeſſors;) *whereby an Eſtate "or Eſtates ſhall or may paſs from the ſaid Arch-Biſhops or "Biſhops* or any of them, (other than for the Term of 21 "Years *or* THREE *Lives*, from ſuch Time as any ſuch Leaſe, "Grant or Aſſurance ſhall begin, and whereupon the old "accuſtomed yearly Rent or more ſhall be *reſerved and pay-"able* yearly during the ſaid Term of 21 Years or three "Lives;) ſhall be *utterly* VOID and of none Effect, to all "Intents and Conſtructions and Purpoſes; any Law Cuſtom or "Uſage to the contrary in any wiſe notwithſtanding." * 'Tis No. 40.

That theſe Offices, at the *Time of the making* of this Act, and *now*, are MERELY NOMINAL, and NO *Duty* Attendance or Service to be done for or in reſpect of them or either of them; in Manner and form as the Biſhop has alledged.

But Whether, &c.

As to the *other* Office (of *Maſter-Keeper* of all the Beaſts in the Parks, or *Chief Parker*) They find That *that* is NOT *an* ANCIENT Office; and that the Biſhop for the Time being hath NOT *anciently and uſually granted* it, nor the Annuity for the Life of the Grantee; And that *that* Office alſo was, at the time of making the Act, and ſtill is an Office MERELY NOMINAL; And that *no Duty*, Service, Work, Labour, Attendance or Buſineſs ever was or is, &c.

The Queſtion upon this Special Verdict, was, "Whether "Sir *John Trelawney*, the Grantee, was intitled to hold the "two firſt mentioned Offices, and to recover theſe Arrears "againſt the *preſent* Biſhop." As to the laſt-mentioned Office

† P. 221. † Office (of Chief Parker) the Facts found by the ſpecial Verdict made an End of any Queſtion concerning it: And the Point was given up.

This Caſe was firſt argued, upon *Tueſday* 27th of *January* 1756, by Mr. *Saluſbury Brereton* for the Plaintiff, and Mr. *Pratt* for the Defendant.

[§ 8, 9 W. 3. c. 11 ſ. 6. relates only to Plaintiffs or Defendants dying after interlocutory Judgment and before final.]

Note—Sir *John Trelawney*, the Plaintiff, § *died* during the Time of the firſt Argument: But, as the Demand was for Arrearages, this Event did not prevent the Court from proceeding to hear the Arguments.

On *Tueſday*. 1ſt *February* 1757, It was again very fully argued by Mr. *Norton* for the Plaintiff, and Mr. Solicitor General (*Yorke*) for the Defendant.

Lord *Mansfield* ſaid he was ready to give his Opinion *Now*: But as Mr. Juſtice *Wilmot* had heard the firſt Argument, He choſe to report to him what had paſſed upon this, and to know his Sentiments, before Judgment ſhould be given: And therefore ordered it to ſtand over till *Saturday* then next.

And, this Day, his Lordſhip gave the Reſolution of the whole Court; after having firſt ſtated the Caſe, to the Effect as above, *&c.*

Lord *Mansfield*——At *Common Law*, a Biſhop *with the Confirmation* of his Dean and Chapter, might exerciſe *every Act of abſolute Ownerſhip*, over the Revenues of his See; and *bind his Succeſſors*, as much as Tenant in Fee can bind his *Heir*.

By the *Statute of* 1 *Eliz. c.* 19. "All Gifts, Grants, "Feoffments, Fines and other Conveyance, or Eſtates, "FROM the firſt Day of that Parliament, had made, done "or ſuffered, or to be had, made, done or ſuffered, by any "Arch-Biſhop or Biſhop, of any Honors Caſtles, Manors, "Lands, Tenements, or other Hereditaments, being *Parcel "of the Poſſeſſion* of his Arch-Biſhoprick or Biſhoprick, or "*united, appertaining or belonging*, to any of the ſame; to "any Perſon (other than to the Queen, her Heirs or Succeſſors;) *whereby any Eſtate ſhould or might paſs* from the "Arch-Biſhop or Biſhop, OTHER *than for the Term of* 21 "*Years or three Lives*, from ſuch Time as any Leaſe, Grant or "Aſſurance ſhall begin; *and whereupon the old accuſtomed "yearly Rent or more*, ſhall be reſerved, payable yearly during the ſaid Term of 21 Years or three Lives; ſhall be "UTTERLY VOID; any Law, Cuſtom, *&c*, notwithſtanding."

Patents or *Grants of Offices*, with Fees, Salaries, or Profits annexed to them, are *not mentioned* in the Act: There are

§ are no general Words adapted to the Caſe of *Offices*. And § P. 222.
yet, there was not a ſingle Biſhoprick, at that Time, *without* ſome Office *granted*.

Had the Legiſlature meant to reſtrain the *Re-granting* them, as they ſhould drop in, it muſt have been done by a *Special Proviſion*, with an *Exception* of ſome, at leaſt of Judicial Offices. As the *general Reſtraint* is *not extended* to the Caſe; there was no Occaſion to make *Exceptions*.

CONTINUING *ancient Offices*, with the *antient Fee*, in the *uſual* Manner, was *not a Dilapidation* of the Revenue of the Biſhoprick. Every Biſhop left this Power to be exerciſed by his Succeſſor, *as* his Predeceſſors left it to be exerciſed by *him*. *Such* Grants bring *no new Charge* upon the Biſhoprick: Which only remains liable to the *ſame Fees or Salaries*, to which it was *liable before*.

The Act has *no Retroſpect*, as to any Charges or Incumbrances whatſoever, brought upon the Revenues of the Biſhoprick, *before* the 1ſt Day of that Seſſion (23 *January* 1558.)

So little were OFFICES thought within it, that the Biſhop of *Ely*, on the 20th of *April* 1558, made a *new Grant* of the *Office of keeping his Houſe and Garden*, (which was *never granted before*,) with a Fee or Salary of 3l. a Year. This came in Judgment in *H.* 10 *Eliz. Ro.* 758. As cited in *Ley* 78. ‖ It was holden *good*; becauſe the Office was thought to be a *neceſſary Office*, and the *Fee reaſonable*. Which is the proper Meaſure whereby to judge, "whether it was an *indirect* "Alienation, under *Colour* of a new Grant:" Though it was extraordinary, to hold this Office neceſſary, or the Fee reaſonable; or indeed, to imagine that any Office could be *neceſſary*, which *never exiſted before*. However, that Determination has been eſteemed good, and acquieſced in.

‖ Moore, pa. 88. reports this Caſe (though he calls the Plaintiff Howſe, and the Manſion Downham,) as of the ſame Term. 10 Eliz. rot 'lo 758. But in Cro. Car. 48. it is cited as of H. 10 Jac. rot 'lo 758. And 2 Brownlow 137. reports it as of M. 9 Jac. 1611.

The next Caſe was in *Trinity* 30 and *Hilary* 31 *Eliz.* (cited in 10 *Co.* 61. *b.* and *Ley* 72 & 75.) The Biſhop of *Cheſter* granted five Marks for Life *pro Concilio*, &c. to *Bolton*: and *Bolton* averred that his Predeceſſors had granted reaſonable Fees, but did not aver this Fee ever to have been granted *before*. The Opinion of the Court was againſt the Plaintiff; So he never had Judgment: And the ‖ Reaſon of the Opinion was, ‖ Ley 73.
"that this was a voluntary Thing, and *not an Office*."

At laſt, in the 43d of *Eliz.* the *true Diſtinction* ſeems to have been taken, (in *Ley* 75;) Where the Arch-Biſhop of *Canterbury* granted the Office of Surveyorſhip, with the ancient Fee, *and more*: It was holden void, *on account of the* NEW *Addition*. That *was* an Injury to the Succeſſor.

* Page 223. * In the first Year of the Reign of King *James* the First, The Legiſlature had this Act, and the ſubject Matter of it, under Conſideration. The 1 *Jac.* 1. *c.* 3. extends to the *King*, that Reſtraint which the firſt of *Eliz.* laid upon Grants made by a Biſhop to a *Subject*. But *though* Queſtions had ariſen upon Grants of Offices; *though*, in Fact, during the whole long Reign of Queen *Elizabeth*, the Biſhops had re-granted their ancient Offices as they fell in;—*Yet*, the Legiſlature did not interpoſe; and therefore meant that *this Power ſhould continue*. They were ſatisfied with the Diſtinction of the Arch-Biſhop of *Canterbury*'s Caſe, in the 43d of *Eliz.* "That no *new* Charge could be brought upon the See."

From the 10th of *Eliz.* (the Time of the Biſhop of *Ely*'s Caſe,) to this Day, No Grant of a *new* Office, with a *new* Fee, ever was held to be good. *Such* a Grant is within the Meaning of the 1ſt of *Eliz.* by Conſtruction; becauſe it is a *colourable Alienation*; and under that Pretext, the whole Statute might be *evaded*.

From the 1ſt of *Eliz.* to this Day, there is no Caſe, where the *Re-grant* of an *Office in Being before the firſt of Eliz.* in the *uſual* Manner, with the *ancient Fee*, was adjudged to be within the Reſtraint of that Statute.

If theſe Grants are not within the Statute, but ſtand as they did at Common Law; the *Utility* or *Neceſſity* of them can never be material. A Biſhop, at Common Law, with the Confirmation of his Dean and Chapter, might bind his Succeſſors by Grants from which they could have no Benefit.

There is no Caſe ſince the 10th of *Eliz.* that has judicially turned upon the *Utility* or *Neceſſity* of the Office: The only Queſtion has been "Whether the Grant was agreeable to "*Uſage* before the firſt of *Eliz.*.'

The Biſhop of *Saliſbury*'s Caſe (10 *Co.* 58. *b.*) T. 11 *Jac.* 1614. came before the Court upon a Demurrer. It is not alledged in the Pleadings of either Side, "that the Office was, "or was not, *neceſſary*." The Plea in Bar to the Avowry was, ſingly, "that the Office *never* was granted *before*, be-"yond *one* Life:" And the Grant was holden good. In the 5th Reſolution, ‡ It was reſolved "That the Grant of "an *ancient Office* to One, with the *ancient Fee*, by a Biſhop, "ſhall not bind his Succeſſor; *unleſs it be confirmed* by the "Dean and Chapter: For SUCH Grants are *not*, as "appears before, reſtrained by the Statute of firſt of "*Eliz.* and therefore *remain at the Common Law*, "and by Conſequence *ought to be confirmed* by the "Dean and Chapter." If ſo, The *Utility* or *Neceſſity*

‡ 10 Co. 62. a.

† *Neceſſity* of the Office was not at all material: For, by the *Common Law*, the Utility or Neceſſity of an Officer was *no* Requiſite towards rendering the Biſhop's Grant of it (confirmed by his Dean and Chapter) good and valid. † P. 224.

The Biſhop of *Chicheſter*'s Caſe, ‡ in *Cro. Car.* 47. and *Ley* 71. (2 *Car.* 1. *Anno Dom.* 1626.) came before the Court upon a Demurrer too.—There is no Allegation in the Pleadings on either Side, as to the Office being *neceſſary*, or not: The Queſtion turned *ſolely* upon the *Addition* of a *new Fee*. ‡ Gee, Biſhop of Chicheſter v. Freedland.

The Caſe of the § Regiſter of *Rocheſter*, in *Cro. Car.* 557. *Hil.* 14 *C.* 1. *Anno Domini* 1638. came before the Court upon a Special Verdict. There is not a Word as to the Office or Reverſionary Grant being *neceſſary*: but it is found to have been *uſually* granted in Reverſion; And *therefore* the Court adjudged ſuch a Grant in Reverſion to be good againſt the Succeſſor. [§ Young v. Fowler, Cro. Car. 555. March 38. 2 Ro. Abr. 153. pl. 7. 8. 154. pl. 5. See alſo Sir Wiiliam Jones 311. Young v. Stowel, Tr. 8 Car. (in an Action upon the Caſe, for diſturbing the Plaintiff in the ſame Office,) S. P. accord.]

Thus ſtood the Conſtruction of this Statute, upon the Reaſon and Words of the Law, Practice, and Judicial Determinations. But it happened that, *beſides the real Ground of the Judgment*, in the Biſhop of *Saliſbury*'s Caſe, they echoed the *Reaſoning* of the Biſhop of *Ely*'s, *without diſtinguiſhing* the eſſential Difference between the two Caſes; and ‖ laboured to prove "that the Office was *neceſſary*." ‖ V. 10 Co. 61. a. b.

Under the great Authority of the Reporter, the ſame Reaſoning is repeated in the ſubſequent Caſes; and where the Grant is good, becauſe it was *warranted by the Uſage* before the 1ſt of *Eliz.* they needs muſt, *ex abundanti*, labour to ſhew, "that the Office is *neceſſary*," by Arguments ſo inconcluſive, and ſo contradictory, that One is ſorry to read, or repeat them. "It is neceſſary to grant for one Life; "but not neceſſary to grant for two, or in Reverſion:" And then, "It is neceſſary to grant in Reverſion; that when the "firſt Life drops, there may be another immediately to fill "the Office." Whereas in *real Truth*, Few of theſe Parent Offices (except the Judicial) are *uſeful*, or *neceſſary* in *any* Senſe: Fewer are neceſſary, or even expedient, to continue *beyond* the Biſhop's *own* time: None neceſſary (by any Colour of Argument) to be granted in *Reverſion*, or for *more than one Life*. But if they *exiſted before the* 1ſt *of Eliz.* they are NOT *within* the Statute, they are governed by the *Common* Law: And *therefore* Grants of them bind the Succeſſors, *how uſeleſs ſoever* they may happen to be.

* Page 225. [† This was an Action upon the Case, in B. R. for disturbing the Plaintiff in his Office of Register to the Bishop of Bristol, (a new Bishoprick founded temp. H. 8.) See 3 Keble 472, 506, 540, 560. S. C.]

* The next Case that was mentioned, was the Case of *Ridley* v. *Pownall*, 2 *Lev.* 136. 27 *C.* 2. † There the *Special Verdict found* the Office to be a *necessary* Office; (which is the *first Instance* where it appeared Judicially to the Court, "that "the Office was necessary;") and that it had been *separalibus temporibus*, since the Foundation of the Bishoprick, granted for 3 Lives.

My Lord *Hale* (who distinguished what He read, and thought and reasoned from Himself) says "*Before the first of Eliz.* "there was *no Difference* between the Grant of Offices, of *an*- "*cient* and *new* Bishopricks: *Both* made *their Grants*, AS "OWNERS; and if they USUALLY granted for Three "Lives *before* the Statute, they may grant so *after*. But the "Verdict is defective, beeause it does not find that it was "USUALLY so done *before the* 1st *of Eliz.*" And on Account of Incertainty, there was a *Venire de novo*. *Otherwise*, Judgment would have been given *for the Defendant*. So that You see, finding the Office to be *necessary*, was *totally immaterial*.

In the Case of *Jones* v. *Beau*, in *B. R.* 3 *W.* & *M.* 1691, reported in 4 *Mod.* 16. The Issue directed, out of Chancery was, "Whether the Office of Chancellor of *Landaff*, had "been *usually* granted to *Two*, before the 1st of *Eliz.*" And the Jury finding "*that* it *had*;" The Court held the Grant of the Office to Two to be good. And no Man alive will say, "that it was *necessary* that the Office of a Bishop's Chancellor "should be granted to *Two*."

The Office in Question in *this* Cause, is found "*never* to "have been more useful or necessary than it is *now*;". And yet *All* the Bishops of *Wincheſter*, from the 1st of *Eliz.* have thought the Grants of it valid; and Every succeeding Bishop has submitted to the Grant made by his Predecessor; And ‡ the greatest Men of the Kingdom, or the nearest Relations to the Bishops, have successively held the Office. The *present* Bishop thought this Grant good, for *Eleven Years*; but has conceived a Doubt, from the Misapplication and Representation of inconclusive and contradictory Arguments about the Office being *necessary*, which are to be found in the Reports of the Cases I have mentioned, before the 27th of *C.* 2d.

‡ Sir John's Grant was "To hold in tam amplo modo, as Richard Earl of Portland, Thomas Cary, George Duke of Buckingham, Charles Earl of Nottingham, Thomas Duke of Norfolk, Philip Earl of Pembroke and Montgomery, James Duke of Ormond, or Henry Earl of Clarendon had holden."

Whereas we are All unanimously of Opinion, That an *Office* and *Fee*, WHICH EXISTED BEFORE THE FIRST OF ELIZ. is *not* within the Statute; but may be granted *since*, precisely in the *same Manner*, in which it was granted *before*: And that the *Utility*, or *Necessity* of such an *Office*, is no more material, *since* the 1st of *Eliz.* than it was *before*. And this Opinion We think agreeable to the *Words* and *Intent* of the Act

† Act, and *every Precedent* ſince the Statute. And in this Opinion, my Brother ‡ *Wilmot* concurs with Us. And therefore there muſt be

† Page 226.
‡ V. ante, 219, 221.

JUDGMENT for the PLAINTIFF.

Which Judgment was ordered, at Mr. *Norton*'s Requeſt, to be entered *as of the Term* in which the *Poſtea* was returnable: Becauſe Sir *John Trelawney* was § dead, between that Time and the preſent Time of pronouncing the Judgment.

§ V. ante, 221.

Goſs *verſ.* Nelſon.

Saturday. 5th February 1757.

MR. *Gould*, *pro Quer'*, ſhewed Cauſe why the Judgment obtained by the Plaintiff againſt the Defendant in an Action upon a Promiſſory Note ſhould not be arreſted: The Note having been objected to, as contingent, uncertain, and not negotiable within the Act of 3, 4 *Ann.* Mr. *Gould*'s Anſwer was that the Sum payable by this Note, is *Debitum in* PRÆSENTI; though *Solvendum in futuro.*

The Queſtion depended entirely upon the Validity of this Note: which was a promiſſory Note given *to* an Infant, ‖ payable "WHEN *He* (the Infant) *ſhall come* OF AGE; and SPE- "CIFYING *the* TIME *when* THAT *was to be, viz.* 12th *June* "1750." The Defendant's Counſel had moved to arreſt the Judgment, for that this *was* not (as they alledged) a good Note, within 3, 4 *Ann. c.* 9. *ſ.* 1. for giving like Remedy, upon Promiſſory Notes, as upon Bills of Exchange.

‖ V. poſt. Roberts v. Peake; a like Point, (viz. payable on the Death of G. H.)

In anſwer to which, Mr. *Gould* now cited 2 *Strange* 1217, the Caſe of *Cooke* v. *Colehan:* Where a Note, "to pay in 6 "Weeks after the Defendant's Father's Death," was holden a *good* Note.

Mr. *Caldecot*, *contra pro Def'*: Here are, in this Declaration, 2 Counts on Notes of Hand indorſed: But the Notes ſet forth in the Declaration, are not Notes for the *Benefit of Trade*; Nor is the Money made CERTAINLY *payable.* The Note was given to the Plaintiff, 13 YEARS *before* the Time when he was to come of Age; And it was *not* at all certain that he *would live* to attain that Age.

He cited 2 *Strange* 1151. The Caſe of *Beardſley* v. *Baldwyn:* "Where a Note "to pay within ſo many Days after "the Defendant ſhould *marry*," was held *not* to be a negotiable Note within the Statute.

The

‡ P. 227. ‡ The Case of *Cooke* v. *Colehan* (cited by Mr. *Gould*) 2 *Strange* 1217. was payable six Weeks after *a Death*: Which was a certain Event.

In order to have the Effect of a Promissory Note within this Statute, it ought to be a *Cash-Note*, and payable at ALL *Events*.

No Note is negotiable, which is not for the Payment of Money *absolutely*. 1 *Strange* 629. *Morris* v. *Lee*. That was a Note promising "to be *accountable* to the Plaintiff or Order "for 100l. Value received."—And held good. But a "*Quære* "*tamen*" is added by Sir *John Strange*. All Notes payable *on Contingencies* are bad, within this Act: And *this* is a CONTINGENCY, "Whether he *may* arrive at the Age of 21; "OR *not*."

Lord *Mansfield*—It would have been clearly good, if it had been made payable on the 12th of *June* 1750; (that is to say, on a *Day certain*;) *without mentioning* the Plaintiff's being then to come of Age: And surely it is *not the less certain*, for *adding* that Circumstance.

Legacies are of a different Nature: And they are determined by different Rules. They are Directions to the Executor, to pay: And in Legacies there is a known Distinction between the Time being annexed to the *Substance* of the Gift, or to the *Payment*. If complete Words of Gift direct the Executor to pay; the other Words only *fix the* TIME of such Payment: And then the Legacy vests, and is transmissible, though the Legatee should die before the Day of Payment: As to a Legacy given, "*to be* paid at 21." But if the Time is annexed to the *Substance* of the Gift, as a Legacy "*if*" or "*when*" he shall attain 21; it will not vest before that Contingency happens.

But *here* the *Words of Engagement* MAKE *the Debt*; And 'tis *no* Direction *to another* Person. The former part of the Note is a Promise to pay the Money: And the Rest is only fixing the *particular* TIME *when* it is to be paid. It is enough, if it be CERTAINLY and at all Events *payable* at that Time, *Whether* he lives till then, *or* dies in the Interim. Therefore it is a GOOD Note, within this *Remedial* Statute.

Indeed a *Contingent* Note, where it is *uncertain* "Whether "the Money shall *ever* become payable *at All*, or not," is another Case: SUCH a Note is *not* within the Statute.

Mr. Just. *Denison* concurred.

For

† For here is *no Condition* or UNCERTAINTY: But it is *to be paid certainly*, and at all Events; only the TIME *of Payment* is *poſtponed*. † P. 228.

And the Caſe of *Cooke* v. *Colehan* was the Opinion of the whole Court.

He alſo cited *Boraſton*'s Caſe, 3 *Go. Rep.* 19, [Which proves " that where the Words refer to what *muſt neceſſarily* " happen, 'tis no Contingency, but a Remainder *executed*." *V. Equity Caſes Abridged, fo.* 190. *pl.* 16. S. C.]

Mr. Juſt. *Foſter* concurred.

A Legacy may be given upon *any* Terms.

But upon a promiſſory Note, the *Time* of Payment is only for the Benefit of the *Debtor*. Here, the Time of Payment is CERTAINLY *fixed*: And the particular Day ſpecified for Payment of the Money, being mentioned to be the Day *on which the Infant is to come of Age*, makes no Difference from what it would have been, if that Circumſtance had been omitted.

And they *All* agreed That this was *Debitum in præſenti*, though *Solvendum in futuro*.

Per Cur' unanimouſly RULE DISCHARGED: And the *Poſtea* ordered to be delivered to the PLAINTIFF.

Goodtitle, ex dimiſſ. Hayward, *verſ.* Whitby. Tueſday, 8th February 1757.

(*Mr. Juſt.* Foſter abſent.)

THIS was a Caſe from *Lancaſter* Aſſizes, upon an Ejectment.

R. P. being ſeiſed &c, deviſed All his Meſſuages, Lands, Tenements, and Hereditaments whatſoever and whereſoever, ſituate, to the Reverend Mr. *Thomas Hayward* and *John Bates* and the Survivor of them and the *Heirs* of ſuch Survivor; " In Truſt, that they and the Survivor of them, his " *Heirs* and Aſſigns ſhould lay out employ and beſtow the " Rents and Profits of the deviſed Premiſſes, for the *Main-* " *tenance, Education, Bringing up* and *putting forth* into the " World, of *Thomas* and *John Hayward*, Sons of the Teſ- " tator's Siſter *Elizabeth Hayward*, DURING *their* MINO- " RITIES: *And* WHEN *and* AS *they ſhould reſpectively* AT- " TAIN

† Page 229. " † TAIN *their Ages of* 21, Then to the Uſe and Behoof *of* " *the ſaid Sons* of his Siſter *Hayward*, the ſaid *Thomas Hay-* " *ward* and *John Hayward, and their Heirs, equally.*" And the Teſtator made the ſaid two Truſtees, the Reverend *Thomas Hayward* and *John Bates* his Executors.

It is ſtated that *Thomas Whitby*, the Defendant, is the Teſtator's Heir at Law.—

That *Thomas* and *John Hayward* are the Teſtator's Siſter's Sons.

Thomas Hayward the Elder of the Teſtator's ſaid two Nephews died *under the Age* of 21, and *without Iſſue.*

Upon his Death, his Brother *John* being then under Age, *Thomas Whitby* the Teſtator's Heir at Law, was let into the MOIETY *of the* DECEASED *Nephew, Thomas Hayward*, by the Truſtees.

John, the ſurviving Brother brings the Ejectment, being now come of Age; and claiming the *Moiety of his deceaſed Brother, as well as* his own proper Moiety.

Queſtion—" Whether this *Moiety of Thomas* the deceaſed " Brother, belongs to *John Hayward*, either *as Heir* to his " Brother, *or as* ſurviving Joint-tenant; Or whether it be- " longs to *Thomas Whitby*, as Heir at Law of the Teſtator, " AS *an undeviſed Eſtate.*"

Mr. *Perrott* for the Plaintiff, (*viz* for *John Hayward*, the ſurviving Nephew of the Teſtator.)

This Point is ſettled by many Reſolutions.

1ſt. This is only a *Chattel*-Intereſt in the Truſtees, (*though* given to them and *their Heirs:* Becauſe it is to laſt ONLY DURING THE MINORITIES of his NEPHEWS.

The Queſtion is, " Whether the Remainder VESTED *in* " *Thomas* and *John Hayward*;" Or " Whether it remained " in CONTINGENCY, *till* their reſpective *Coming of Age.*"

All that the *Teſtator had in View*, in this Truſt, was to provide for the Care of his Nephews DURING *their* MINORITIES: And He only meant that the Time *of their Coming of Age, ſhould determine the* TIME when they ſhould be capable of *Acting for themſelves*; NOT to make it CONTINGENT *till* they ſhould come to 21. For at that rate, *if* they had *married*, and *died under* 21, THEIR CHILDREN *could* NOT *have taken:* Which the Teſtator, moſt undoubtedly, could *never mean.*

Boraſton's

* *Boraſton*'s Caſe, 3 *Co.* 21. was held a *veſted* Remainder. * P. 239.

The Caſe of *Taylor* v. *Biddal*, 2 *Mod.* 289. is in Point.

The Caſe of *Edwards* v. *Hammond*, 3 *Lev.* 132. (Where the Eſtate's being contingent or not, depended upon its being a Condition precedent or ſubſequent,) was only held a Condition ſubſequent, and a *preſent* Deviſe to the Eldeſt Son.

Equity Caſes abridged, *H.* 1713. *fo.* 195. *pl.* 4. The Caſe of *Mansfield* v. *Dugard*, is almoſt the ſame with the preſent Caſe.

So here, the Eſtate *veſted immediately* in the two nephews, upon the Death of the Teſtator; And therefore upon the Death of *Thomas*, his Brother *John* is intitled to this Moiety; either as Heir at Law to him, or his Survivor.

Mr. *Norton*, *pro Def*^{t} *Thomas Whitby*, the Teſtator's Heir at Law.

The Will is, in Subſtance, no more than this—

The Teſtator gives to *A.* and *B.* and the Survivor of them and the Heirs of ſuch ſurvivor, All his Meſſuages, Lands, Tenement, *&c*, IN TRUST that they ſhall diſpoſe of the Rents and Profits of the deviſed Premiſſes for the Maintenance, Education, Bringing up, and putting forth into the World, of his two Nephews (his Siſter's Sons) *Thomas* and *John Hayward*, *during their Minorities:* And WHEN and AS they ſhould reſpectfully attain to 21; then to the Uſe and Behoof of them the ſaid *Thomas* and *John Hayward* his two Nephews, and their Heirs, equally.

The Caſes on this Head appear indeed *inconſiſtent* and *repugnant:* But the *true Method of ſolving* them is, to attend to the INTENTION *of the Teſtator.*

Now here the Teſtator *intended* his Nephews a *Fee*, IF they ſhould *live* to make uſe of it: IF *not*, then *only a Proviſion during their Minority.*

And it is a Rule, " that the Heir at Law ſhall NOT *be diſinherited* by *Uncertain* Words of a Deviſe."

Here, NOTHING VESTED *in either of the two Nephews, during* their *Minorities.*

‡ Page 231. ‡ If *the Teſtator had intended* a Benefit of Survivorſhip, to his two Nephews, He *knew how* to do it; as appears by *another Part* of his Will.

The two Nephews were not Each of them *intitled to a Moiety* of the *Profits during their Minority:* For they were *only* to be *maintained at the* Discretion *of the Executors.*

The Queſtion is, "Whether this be, or be not, a *Condition* precedent; or an Eſtate depending upon a future Event that makes it uncertain whether it ſhall ever take Effect."

Sheppard's Touchſtone of Common Aſſurances, 117. defines a Condition precedent, to be "Where the Condition muſt be fulfilled, ere the Eſtate can take Effect."

A Giſt to *A.* "if he comes from *Rome*," does not veſt *till* he comes from *Rome.*

Juſt ſo, a Deviſe to *A.* if he comes *of Age:* cannot veſt *till* he comes of Age.

And he was not to have the Fee, *till* then.

In Giſts of *perſonal* Eſtate or Legacies, it is the ſame. For if the Time is annexed to the *Legacy* itſelf, and not to the Payment of it, then, if the Legatee dies before the Time of Payment, it is a lapſed Legacy: But if annexed to the *Payment*, then 'tis not. 1 *Leo.* 167.‡

‡ V. ante, 226. S. P. accord.

2 *Salk.* 415, *Pl.* 2. The Caſe of *Smell contra Dee*, 6 *Ann.* in Chancery. 2 *Vern.* 349.

As to the Executors taking only a Chattel-*Intereſt*; The being *defeaſible* does not make it the leſs a *Fee.*

In the Caſe of *Gardner* v. *Sheldon* [*Vaughan* 259.] it is ſo laid down by Ld. *Vaughan.*

This is a Fee to the Truſtees and *their Heirs*; though *liable indeed to a Contingency.* 'Tis the Word "*Heirs*" that makes it a Fee. *Littleton* §. 1.

If ſo, then it cannot be a veſted Remainder; but muſt be an Executory Deviſe, a *mere contingent Intereſt.* 10 *Co.* 85. *Leonard Loveis*'s Caſe.

As

† As to Mr. *Perrott's* Caſes— †Page 232.

Braſton's Caſe, 3 *Co.* 23. is not at all applicable to the preſent Caſe: And it was there *neceſſary*, towards forwarding the *Intention of the Teſtator*, that it *ſhould be* a *veſted* Intereſt. And that was an *expreſs* Deviſe of a *Chattel:* So that the *Fee veſted immediately*. But here are *no* ſuch Circumſtances, in *this Caſe*.

As to the Caſe of *Taylor* v. *Biddal*, 2 *Mod.* 289. *There* alſo was an *expreſs Deviſe* of a *Chattel*, to *Elizabeth Wharton*; And the Fee deſcending to Her, *would have* MERGED *the Term, contrary* to the *Intention and Words* of the Teſtator.

As to the Caſe of *Edwards* v. *Hammond*, 3 *Lev.* 132. It is no more applicable to the preſent Caſe, than the other two are. That was a Condition *ſubſequent*.

But *here* are *no* Words to ſhew the *Intention* of the Teſtator to have been, "That if either of his Nephews ſhould die, his "Heir at Law ſhould not inherit."

And here it is ſtated that the Teſtator's Heir at Law was let into and held this Moiety by *Conſent of all the Parties*, TILL this *John* came of *Age*. [*V. ante* 229.]

As to the Caſe of *Mansfield* v. *Dugard*, It is diſtinguiſhable from the preſent Caſe.

Mr. *Perrott*, was going to reply—But Lord *Mansfield*, ſtopt him, and ſaid it was unneceſſary.

Lord MANSFIELD—

The Caſe is no more than this. *R. P.* being ſeiſed in Fee, makes his Will to the following Effect—"I give and deviſe all my Meſſuages Lands Tenements and Hereditaments &c, unto the Reverend *Thomas Hayward* and *John Bates* and the Survivor of them, and to the *Heirs* of ſuch Survivor, In TRUST to and for the Benefit of my Nephews *Thomas* and *John Hayward*; That is to ſay, upon Truſt and Confidence That the ſaid *Thomas Hayward* and *John Bates* and the Survivor of them, his *Heirs* and Aſſigns, ſhall lay out and employ the Rents and Profits of the ſaid Premiſſes for the *Maintenance, Education, Bringing up* and *Putting out* in the World, of the ſaid *Thomas* and *John Hayward*, (the Teſtator's two Nephews,) DURING *their* MINORITIES: And WHEN and AS they ſhall attain their reſpective Ages of 21, My Will and Deſire is that the ſame Premiſſes ſhall be and remain to them the ſaid *Thomas Hayward*, and *John Hayward*, and their Heirs, equally." And he makes the ſame *T. H.* and *J. B.* his Executors.

It

* P. 233. * It is ſtated, that the Defendant *Whitby* is the Teſtator's Heir at Law: But the Caſe does not ſtate *how*, and in what Courſe of Conſanguinity, *Thomas Whitby* is Heir at Law. 'Tis probable that He is *not* of the *Male* Line; becauſe his Name is *Whitby*.

The Teſtator died. *T. H.* and *J. B.* the two Truſtees, entered into Poſſeſſion. Then, *Thomas Hayward*, one of the two Nephews and Deviſees died, under Age, and without Iſſue. Then, the Truſtees let the now Defendant, the Teſtator's Heir at Law, into Poſſeſſion of his Moiety. But it is not material What *they* did among *themſelves:* That will not affect the *Right* of the Plaintiff.

The Queſtion is, " Whether the Eſtate *veſted* immediately " in the two Nephews, upon the Death of the Teſtator; Or " *remained in Contingency*, till their reſpective coming of Age:" And conſequently, " Whether this Moiety belongs to *John* " *Hayward*, upon the Death of his Brother *Thomas*, *either* as " his Heir at Law, or as Survivor; or whether it deſcends " to the Heir at Law of the Teſtator, as being *undeviſed*."

In the Conſtruction of Wills, adjudged Caſes may very properly be argued from; if they eſtabliſh General Rules of Conſtruction, to find out the *Intention of the Teſtator:* Which Intention ought to *prevail*, if *agreeable* to the Rules of Law.

Here it is agreed that a *Fee is deviſed* to the Nephews: but it is made a Queſtion, " Whether it be a Fee depending " upon a *precedent Contingency*; or, an *immediate* Fee."

He ſaid He would lay down a Rule or two of Conſtruction, previouſly to giving his particular Opinion on this Caſe.

1ſt. Wherever the *whole* Property is deviſed, with a particular Intereſt given *out of it*, it operates by way of *Exception* out of the abſolute Property.

This Rule is laid down in *Matthew Manning*'s Caſe, 8 *Co.* 95. *b.*

2d. Where an *abſolute* Property is given; And a particular Intereſt given in the *mean time*, as " UNTIL the Deviſee ſhall " come of Age *&c*;" And *when* he ſhall come of Age *&c*, " then to Him *&c*:" The Rule is, that that ſhall *not* operate as a Condition *precedent*; but as a Deſcription of the Time when the Remainder-Man is to take *in Poſſeſſion*.

And to this Purpoſe is *Boraſton*'s Caſe, 3 *Co.* 21. *a. b.* Where this Doctrine is fully laid down and explained.

And

‡ And this is ſufficient to anſwer the Intention of the Teſtator: The Deviſee *does not want it* in the *mean Time*. ‡ P. 234.

The Caſe of *Mansfield* v. *Dugard*,—in the *Abridgment of Equity Caſes* 195. *pl.* 4. is alſo very ſtrong, to prove the general Rule.

Here, upon the *Reaſon* of the Thing, the *Infant* is the *Object* of the Teſtator's Bounty: And the Teſtator does not mean to deprive him of it, in *any Event*. Now ſuppoſe that this Object of the Teſtator's Bounty *marries*, and *dies before his Age of* 21, *leaving* CHILDREN; *could the Teſtator intend* in ſuch an Event, to *diſinherit Him?* Certainly, He could not. And as to the Teſtator's Heir at Law, *His* Heir at Law is only to take what the Teſtator has not deviſed away from Him.

But in the preſent Caſe, the Teſtator takes no Notice of this *Thomas Whitby*, who is indeed ſtated to be (but it doth not appear *how*) his Heir at Law. And He does not except any Thing out of the Intereſt he has given to his Nephews: He only makes a Truſt, to be executed for THEIR *Benefit*; And deviſes *nothing* for the Benefit of the *Truſtees*, who were *alſo* his Executors. And this is *only a* CHATTEL-Intereſt, which CAN NOT *laſt* 21 *Years*.

On the Rule in *Matthew Manning*'s Caſe, here is, (at the utmoſt) only an *Exception*, by this Deviſe to the Truſtees, *out of* the abſolute Property given to his Nephews.

'Tis ſo plain upon the true Intent and Meaning of this Will, that it is a ſhame to cite Caſes upon it. But yet I remember an appoſite Caſe, in *H.* 17 *G.* 2. *in Canc. Tomkins* v. *Tomkins*, where the Deviſe was, "to his Brother in Truſt "for his eldeſt Son *B. till* he ſhould attain 21 Years; and "if he ſhould die before 21, then a Deviſe over." *The Court* held the Age of 21 to be no Limitation of *B*'s INTEREST; but only a Limitation of the *Truſt*, during his Minority; And that *B.* took the whole by Implication.

So here, the *Property* is *abſolutely given:* And the Limitation is only of the *Truſt*.

Therefore upon the whole, He held the preſent Caſe to be

An *immediate* Gift to the two Nephews; with a Truſt to be executed for their Benefit, during their Minority.

Per Cur. Let the *Poſtea* be delivered to the Plaintiff.

Maſter,

*P. 235. * Maſter, &c, of the Vintners Company *verſ.* Paſſey.

THIS was an Action of Debt brought upon a By-Law of this Company.

The Declaration (after a proper Introduction) ſet forth the By-Law, which was made on the 24th *April* 1656, intitled "An Ordinance of Election of Men into the Livery of the "Corporation or Miſtery of Vintners of the City of *London*:" Whereby it was ordained and eſtabliſhed, That the Maſter and Wardens of the Corporation or Miſtery of Vintners of the City of *London*, for the Time being, ſhould have a decent Livery, comely for themſelves, and meet to attend upon the Lord Mayor and his Brethren the Aldermen of the ſaid City from Time to Time and at all Times, as Need ſhould require; and upon the ſaid Maſter and Wardens, at all ſuch Time or Times thereafter, and in ſuch Gowns and Liveries, as they ſhould be lawfully warned and ſummoned to come and be in, upon any neceſſary Occaſions concerning the Credit and Worſhip of the ſaid Company; And alſo that once in every Year, or Oftner if occaſion ſhould ſerve, the ſaid Maſter Wardens and Aſſiſtants, or the Major Part of them which ſhould be then preſent at a Court of Aſſiſtants for the Time being, to be holden for the ſaid Miſtery, *ſhould and might* ELECT *and chooſe into the* LIVERY *or* CLOTHING of the ſaid Corporation or Miſtery, SUCH AND SO MANY *of the Yeomandry* of the ſaid Miſtery, *as ſhould ſeem moſt meet and convenient* unto them; And that EVERY SUCH PERSON *of the ſaid Yeomandry ſo choſen into the ſaid Livery* as aforeſaid, *ſhould* AT *or* BEFORE *his Admiſſion into the ſaid Livery*, PAY to the Maſter, Wardens and Freemen and Commonalty of the Miſtery of Vintners of the City of *London*, to their Uſe, the Sum of 31 *l.* 13 *s.* 4 *d*, of lawful Money of *England*. And then and there, at the ſame Aſſembly, the ſaid Maſter, &c, did make another By-Law, That *Every Perſon and Perſons* of the ſaid Corporation, *which at any Time thereafter ſhould be* by the ſaid Maſter, Wardens, &c. for the Time being, at any Court, &c. ELECTED OR CHOSEN *into the Livery* of the ſaid Miſtery; and *ſhould not, upon Notice* given to Him or them in that Behalf, by the Clerk or Beadle, ACCEPT *of the ſame*; or upon Acceptance thereof, ſhould, before his Admiſſion into the ſaid Livery, REFUSE *to* PAY to the ſaid Maſter, &c., the *Sum of* 31 *l.* 13 *s.* 4 *d.* that then *every Particular ſo refuſing* to accept, &c. or to pay as aforeſaid, *ſhould* FORFEIT, &c, to the ſaid Maſter, &c, the *Sum of* 25 *l.* to be recovered by Action of Debt, Bill, Plaint, or Information, to be brought in any Court of Record within the Commonwealth of *England*, by the ſaid Maſter, &c.

Then

† Then the Declaration avers both the ſaid By-Laws to be reaſonable, &c; And alſo that at the Time of the making them, and ever ſince, All the Freemen of the ſaid Miſtery, before their Admiſſion to the Livery, were known by the name of the Yeomandry; And that the Defendant was a fit and able and proper Perſon to be elected into the Livery and Clothing of the ſaid Company. Then it ſets forth his Election upon the Livery; and that he refuſed, &c. † P. 236.

To this Declaration—

The firſt Plea was "*Nil debet.*" And there was alſo, by Leave, a 2d Plea, That there are 12 *greater* Livery-Companies, in *London*, and other inferior Companies; And that an Order was made at a Court holden before the Lord Mayor and Aldermen &c, on &c, at &c; At which Court it was enacted &c, "And that no Perſon ſhould take upon "himſelf the Livery of any Company being *one of the ſaid* "12 Companies, &c, Unleſs he ſhould have an Eſtate of "1000 *l.* &c." And the Plea avers, That this *was one of the* 12 Companies; And that he had *not* an Eſtate of 1000 *l.* &c. And therefore he ſays, that he was *not duly elected* upon the ſaid Livery of this Company of Vintners.

The Plaintiffs demur to this 2d Plea: And the Defendant joins in Demurrer.

Mr. *Williams pro Quer.* made three Objections to the Plea.

1ſt Objection—That it is not ſet out *by what Authority* the Court which made this Order was holden. *Clift.* 186, 196.

2d Objection. The Court is *uncertain*: For *many* Courts are holden before the Mayor and Aldermen; And *Non conſtat, which* of them this is.

3dly *Non conſtat, what Authority* the Court of the Lord Mayor and Aldermen had *to make* this Order.

Mr. Serjeant *Martin pro Def.* ſaid—

It was not known, *at the Time of the Plea*, nor can *now* be known, WHAT *Authority* the Court of Lord Mayor and Aldermen had to make this Order: Therefore He gave up the Plea.

But

‡P. 237. ‡ But he objected to the Declaration, in two Reſpects.

1ſt. The By-Laws are bad.

2d. The Defendant was *not duly ſummoned* to *attend at the Court of Aſſiſtants*, to take upon him the Livery.

Firſt—The By-Laws are *arbitrary*, *illegal*, *oppreſſive*, and *not warranted* by Cuſtom or Charter.

They are, " That the Company may elect *ſuch* of the " Yeomandry of their Members as ſhould *ſeem moſt meet and* " *convenient to them*, upon the Livery of their Company;" And " that every Perſon ſo elected, who ſhould refuſe &c, " ſhall forfeit &c; And EVERY *Perſon ſo elected*, ſhall ac- " cept the ſame, and ſhall upon or before Admiſſion, pay " 31 *l.* 13 *s.* 4 *d.* for an Admiſſion Fee, or Forfeiture, of " 25 *l.*" (which Penalty of 25 *l.* is made payable abſolutely and in all Events.)

Now the Livery-Men ought to be *Perſons of Subſtance*, *capable* of being at the Expence of ſerving or paying the Fine.

And the Averment " That he was a fit and able and pro- " per Perſon," goes only to the juſt *Execution* of the By-Law; But it will not make the By-Law *itſelf* good, which is in itſelf void.

3 *Lev.* 293. Mayor &c, of *Oxford* v. *Wildgooſe*: [in Point, as to this.]

The Right " to have a Livery" muſt be founded either on Charter or Cuſtom.

Paſch. 30 *G.* 2. Innholders Company *v. Gledhill*, *B. R.* —was ſo determined; And that the Court can't preſume it: And the want of ſhewing this, was holden to be ſuch a Fault in the Declaration, as might be taken Advantage of upon General Demurrer.

In *Lilly*'s Entries there is a Precedent of ſuch a Pleading upon ſuch a By-Law.

On 27 *July* 1697. The Mayor and Aldermen made an Order (ſet forth in the Pleadings,) which ſhews the Opinion of that Court upon this Head of *Sufficiency* of the Perſons elected.

In *Raym.* 446. *Taverner*'s Caſe 33 *C.* 2. (which is cited for the Sake of the Return,) This very Company made it Part of their Return to the Mandamus, " That every Livery-Man of " this

" * this very Company was uſed and ought to be *de bono* * P. 238.
" *Statu et Subſtantia*," &c. [But N. B. the Fine of 31 *l.* 13 *s.* 4 *d.* was there allowed to be good.]

Comberb. 221. The Caſe of the Stationers Company v. *Salisbury*: (which was cited, as to the 1ſt Objection of it, and applied to the 1ſt Objection here:) Alſo the 2d Exception there, anſwers (as the Serjeant obſerved) to the 2d Objection here. [But that Caſe was not determined.]

2d. Objection to the Declaration--*Non conſtat* that He was *ſummoned* to attend at the Court of Aſſiſtants, to take upon him the Livery.

The Declaration ſhews, that the Maſter and One Warden may appoint a Court *whenever* they pleaſe: So that the Time of holding this Court, is *uncertain*. And they only ſhew that he was ſummoned to attend at the *next* Court, *generally*; without ſpecifying WHEN *it was to be holden*.

Mr. *Williams* in Reply.

1ſt. Theſe By-Laws are now of above 100 Years ſtanding: And they have been holden good, notwithſtanding all Objections. Vide *Raym.* 446. *Taverner*'s Caſe: [Where the Return of them was allowed,] And they ought to receive a favourable Conſtruction.

If they chooſe a Perſon unfit, it may be taken Advantage of in Pleading, or upon Evidence.

City of *London* v. *Vanacker*, *Carthew*, 480, 483. A Power " to elect ſuch Perſons as ſhould *ſeem* to them to be " fit and able"—gives them a Diſcretion. 5 *Co.* 100. *a. Rooke*'s Caſe.

This is a diſcretionary Power; and is confined to ſuch as are fit and able; though it muſt be legally executed.

It is objected alſo, that the Penalty of 25 *l.* is made payable *abſolutely*: Whereas it ought to be, *unleſs* he has a reaſonable Excuſe.

But this is implied.

And if he *has* a reaſonable Excuſe he may plead *Nil debet*.

Carthew 483. City of *London*, v. *Vanacker*: [in Point.] 1 *Lutw.* 402. By-Law of the City of *Canterbury*: Where *Non debet* was pleaded. (v. fo. 405.)

† P. 239. † In Anſwer to the 2d Objection—

As to the *Time* of holding the Court, the Objection is only to the *Form* of the Declaration. But

It is averred " That Notice was DULY given Him of his " Election;" And " That Notice was DULY given Him, " to attend at the *next* Court of Aſſiſtants."

Beſides, He, AS a MEMBER *of the Company*, was OBLIGED *to* TAKE *Notice* of the *Time* of holding their Courts.

As to 3 *Lev.* 293. The By-Law there does not even *confine it* to the *Inhabitants* of the City: But *this is confined* to the Members of the Company. [Still, This is no Anſwer to the material Objection.]

As to *Comberb.* 221. It was not determined. [No more it was.]

Lord *Manſfield*—

The *Plea* is *admitted* to be bad.

The Objections are to the By-Law: Which has been of 100 Years ſtanding: and, ſeveral Times, judicially before the Court; and yet this Objection has never been hit upon.

However, One Anſwer ſtrikes me: which is " That " NIL DEBET *may be pleaded*, if the Party was *really* unfit." *Carthew* 483. *Vanacker's* Caſe, and 1 *Lutw.* 402. 405. Major, *&c. de Cambridge* v. *Herring*—are Proofs of this.—By the former, it appears that it may be given in Evidence, upon *Nil debet* pleaded: and in the latter, it was actually pleaded; and Iſſue taken upon it. And this equally holds, as to *any* reaſonable Excuſe. And We *will not intend* him to have been an improper Perſon.

Being a Livery-Man of the Company, He *ought to know* when the next Court is: And therefore *this* Objection has not much Weight.

Mr. Juſt. *Deniſon.*

The By-Law gives Power " to elect ſuch and *ſo many* " out of the Yeomandry, upon the Livery, as ſhall ſeem to " them moſt meet and convenient." The main Deſign ſeems to relate to the *Number*. As to the *Ability*——By-Laws ought to have a *reaſonable* Conſtruction: We ought not to conſtrue them ſo ſtrictly, as to take them to be void, if *every particular* Reaſon of making them, does not *appear*.

Now

‡ Now here, it is objected "that the Perſon elected ‡ P. 240.
"MAY be a *Beggar*."

But We can never *intend* that they would chooſe Perſons NOT *meet and convenient*.

And *if* this be done, "*Nil debet*" will bring that Queſtion before the Court.

And You cannot, upon this *Record*, take in the Order of the Court of Lord Mayor and Aldermen; becauſe THAT *Plea* is given up.

And the *Notice* ſhall be *intended* to be regular.

This is an ancient By-Law; And Nothing unreaſonable appears upon the *Face* of *it*.

Per Cur. (*viz.* Lord *Mansfield* and Mr. Juſtice *Deniſon*, the Other two Judges being abſent,)
JUDGMENT for the PLAINTIFF.

Wilſon, Clerk, *verſ.* Greaves.

MR. Serjeant *Hewitt* ſhewed cauſe againſt a Prohibition, which Mr. Serjeant *Poole* had moved for (on the 6th of *July* laſt) to be directed to the Arch-Deacon of *Nottingham*, to ſtay his Proceeding in Suit againſt Mr. *Wilſon*, (Parſon of *Newark*,) for *brawling* in the Church, and alſo for *ſmiting* in the Church: But he prayed the Prohibition, only as to the latter Charge, the *ſmiting* in the Church [*V.* 5, 6 *E.* 6. *c.* 4. § 2: Which Act contains 3 diſtinct Clauſes, levelled againſt 3 diſtinct Offences committed in Churches and Church-Yards; *viz.* the 1ſt againſt quarrelling, chiding, or brawling, by Words only; the 2d againſt ſmiting, or laying violent Hands; the 3d againſt ſtriking with a weapon, or drawing One with Intent to ſtrike.]

His Objection was, That as to *this* Offence of *ſmiting* in the Church, there ought to have been a *previous* CONVICTION *at* LAW; though the Statute ſays "That he ſhall "*ipſo facto* be deemed excommunicate." In Proof of which he cited *Cro. Eliz.* 224. *pl.* 6. *Dethick*'s Caſe; Where he was *indicted* upon this Statute of 5, 6 *E.* 6. for Striking in St. *Paul's* Church-Yard: Though he got off indeed, for want of being named *Garter*.

1 *Ventr.* 146. The Caſe of *Dyer* v. *Eaſt*, is full in Point, "That the Striker in a Church-Yard does not ſtand *ipſo*

† P. 241. " † *facto* excommunicated, UNTIL he be thereof convicted at " Law, and this tranſmitted to the Ordinary."

And here having been no *previous Conviction* at Law, He prayed a Prohibition *quoad the ſmiting:* And obtained
A RULE to ſhew Cauſe.

Againſt which Rule, Mr. Serjeant *Hewitt* (on *Monday* 7th *February* 1757,) ſhewed Cauſe, as follows.

On 5, 6 *E.* 6. *c.* 4. there are 3 Sections, and three different Offences: and this Offence charged in the Libel, is not an Offence conſtituted ſo by this Act; but was a Matter within the Juriſdiction of the Spiritual Court, *before* that Act, and *abſtractedly from* it. They have, without Diſpute, Juriſdiction as to the *Brawling*. And as to the ſecond Branch, for *Smiting in the Church*, there needs not be a previous Conviction at *Common* Law: It is enough, if the Excommunication be in the *Spiritual* Court. To prove which, he cited *Hetley* 86. The Caſe of *Viner* v. *Eaton*: *Cro. Jac.* 462. The Caſe of *Large* v. *Alton*, *pl.* 7: *Cro. Eliz.* 680. The Caſe of *Baker* v. *Brent and Robinſon*. 1 *Hawk. P. C. fo.* 139. *c.* 63. § 27.

2 *Ld. Raym.* 850. The Caſe of *Wenmouth* v. *Collins*. The Court denied a Prohibition: becauſe this Offence was originally and before this Statute, conuſable in the Eccleſiaſtical Court, *ratione loci*; And that the Statute, though it provides a Penalty, does not alter the Juriſdiction.

Therefore, he concluded that notwithſtanding *this* Objection, The Spiritual Court *have* Juriſdiction.

It was then adjourned to the next Day; when it proceeded and was determined. Mr Juſtice *Foſter* and Mr. Juſtice *Wilmot* were both abſent.

Tueſday, 8th February 1757. Mr. Serjeant *Poole*—I cited 1 *Ventr.* 146. *Dyer* v. *Eaſt*, as a Caſe in Point, " That there *muſt be* a previous Convic- " tion by a Trial *at Law*;" And " that ſuch Conviction " muſt be *tranſmitted* to the Spiritual Court."

Cro. Eliz. 224. *Dethick*'s Caſe: Where there was an Indictment actually found and pleaded to.

As to My Brother *Hewit*'s Caſes—

Hetley 86. *Viner* againſt *Eaton*, is a looſe, incomplete Note; and gives no reaſon why the Prohibition was denied.

Cro.

† *Cro. Jac.* 462. *Large* v. *Alton* proves Nothing at all to the preſent Purpoſe: And it was for *brawling, only*; In which Caſe, I agree that no Prohibition ſhall go. † P. 242.

Cro. Eliz. 680. is indeed in the Alternative, "after Sentence, *or* due Trial and Conviction, and not before." But that is only ſaid by *Dodderidge*, then at the Bar, in arguing for the Defendant.

Wenmouth v. *Collins might* be for a Prohibition *generally*. Indeed a Reaſon is given for denying the Prohibition; *viz.* "That the Spiritual Court originally had Juriſdiction to hold "Plea of this Matter, before the Act."

But I deny that they had ſuch *Original* Juriſdiction: And the Act *gives them None*. This is a Force *Vi et Armis*; An Aſſault and Beating: And the temporal Courts will prohibit them from proceeding upon it.

Bro. Prohibition pl. 14. and *Bro. Conſultation* 6. are expreſs, "that Where a Man ſues in the Spiritual Court; And an "Action at Common Law lies for the ſame Matter; A Pro-"hibition lies, And No Conſultation ſhall be granted." [Theſe are Both the ſame Caſe; *viz.* 22 *E.* 4. 20.]

Mr. *Taylor White* ſpoke on the ſame Side, for Mr. *Wilſon*.

He even attempted to ſhew that a Prohibition would be reaſonable as to the *Brawling*: For that the Fact ſtated could not come within the Notion of brawling; And it was only ſpeaking to a third Perſon, to turn *Greaves* out of the Church.

As to the *Striking*—The Spiritual Court had no Juriſdiction *before* the Statute; And the Statute gives them None: They have only Power to *pronounce the Sentence* of Excommunication; but *not* the Power of *Judging*.

As to the Caſe of *Wenmouth* v. *Collins*, It is but a looſe Note; and *Holt* was abſent; and there might have been a Confeſſion.

And there have been many Indictments, He ſaid, on this Statute; And *this* Method of Conviction was the *ancient* Method.

Lord *Mansfield*—

The Statute of 5, 6 *Ed.* 6. *c.* 4. has three Degrees of Offences, and three different Puniſhments.

And

† P. 243. † And whatever Juriſdiction the Spiritual Court might claim *before* the Act, they are *now* proceeding *ſince* the Act: Therefore it is not very material how the Matter ſtood *before* the Act.

The Puniſhment is given, by this Act, to the Eccleſiaſtical Court: And the Puniſhment is ſuch as can only be executed BY *the Ordinary*.

The Caſe ſtated with regard to the firſt Offence, is ſufficiently a *Brawling*, within the Meaning of the Act.

The ſecond Offence is SMITING *in the Church*, or *Church Yard*.

Now this is indeed *ſtill* an Offence at *Common* Law; And He *may* be indicted for it: But, beſides this, He may, by this Act, be *ipſo Facto*, excommunicated. By whom? By the Ordinary. Indeed the Ordinary *may* uſe a Conviction at Law, as a *Proof* of the Fact.

And the Caſe in *Raym.* [2 *Ld. Raym.* 850. *Wenmouth* v. *Collins*,] is a plain Proof that the Eccleſiaſtical Court may proceed upon the two firſt Clauſes, and are not to be prohibited.

But then there is a third Offence and a third Puniſhment mentioned in the Act of 5, 6 *E.* 6. *c.* 4: Which has made all the Confuſion. This Offence is maliciouſly ſtriking with any Weapon, in any Church or Church-Yard, or drawing any Weapon there, with Intent to ſtrike. For this 3d Offence, the Act inflicts a double Puniſhment; One, Temporal; the other, Spiritual: The Temporal Puniſhment is Loſs of an Ear, or Marking in the Cheek, *after Conviction*; the Spiritual is, "And *beſides*, Every ſuch Perſon to be and ſtand *ipſo Facto* "excommunicated as is aforeſaid."

Here, indeed, there muſt be a *previous* Conviction; And a Tranſmiſſion of the Sentence; and a Declaration.

But on the ſecond Clauſe, No *previous* Conviction is neceſſary: (though, *if* there is one, it may be uſed AS *a Proof* of the Fact.)

This Libel is upon the *firſt* and *ſecond* Clauſes: NOT upon the *third*.

And the Proceedings of the two Courts being *diverſo intuitu*, it is no Objection, to ſay, "That a Man will, at this rate, "be *twice puniſhed* for the *ſame* Offence."

This is *common*, in many Caſes: For *We* proceed, to *puniſh*; *They to amend*.

'Tis

‡ 'Tis clear, that upon the TWO FIRST *Clauſes*, the Ec- ‡ P. 244.
cleſiaſtical Court HAS a Juriſdiction.

The Caſes upon Words do not apply to the preſent Caſe.

Mr. Juſt. *Deniſon* concurred.

Their Proceedings are *pro Salute Animæ*. Indeed if they proceed for *Damages*, this Court will prohibit them. And that was laid down by the Court in the Caſe of *Large* v. *Alton*, in *Cro. Jac.* 462. where the Coſts being given only *pro Expenſis Litis*, the Court would not prohibit them: But they declared that they would have done otherwiſe, if it had been *pro damnis*.

And it is plain to me, that the Caſe in 1 *Ventr.* 146. *Dyer* v. *Eaſt*, was really a Determination upon the *third* Clauſe of the Act; and is a Miſtake: I ſuppoſe the Words "*with a Weapon*," are *left out, by Miſtake*. The Reporter was then a Young Man.

But however, this is the *only* Caſe to be met with, to this Purpoſe; And it muſt be a Miſtake, either in the State of the Caſe, or in the Opinion: For on the *ſecond* Clauſe, Surely, We can NOT prohibit them; becauſe they are exactly within the *Words* of the Statute, "That if any Perſon "or Perſons ſhall ſmite or lay any violent Hands upon any "other, either in any Church or Church-Yard, they ſhall "*ipſo Facto* be deemed Excommunicate."

Per Cur', (*viz.* the only two Judges now preſent)
The RULE WAS DISCHARGED.

Woolley et al' *verſ.* Cobbe et al' (Bail of *Cobbe*, a Bankrupt.) Wedneſday. 9th February 1757.

THE original Defendant became Bankrupt, pending the Action. The Bail was *fixed* in *July*. The Bankrupt obtained his *Certificate*, in *Auguſt* following.

The Queſtion was, "Whether the *Bail* ſhould be *diſ-*"*charged*, by this *Certificate*," (which was not obtained *till* AFTER they were *fixed* and the *Debt levied* upon them by *Fi. Fa.* and the Money *actually in Hands of the Sheriff*;) Or "Whether the Bail were become *abſolutely liable*; and Conſequently, the Certificate came too late to help them."

Lord

‡ Page 245. ‡ Lord *Mansfield* made a Diſtinction, And Mr. Juſt. *Deniſon* and Mr. Juſt. *Foſter* agreed to it, " That if the Cer-
" tificate is obtained *before* the Bail are *fixed*, they ſhall be
" *diſcharged:* But if they are *fixed*, before the Certificate is
" obtained, they *remain liable.*"

V. poſt. 436. *Mich.* 1757. 31 *G.* 2. *B. R. Cockerill* v. *Cowſton* S. P. agreed to by the whole Court. Alſo, *Ludlam* v. *Maidwell*, 26th *May* 1772, 12 *G.* 3.

Rex *verſ.* Gayer Eſq.

MR. *Gould* and Mr. *Willes* ſhewed Cauſe againſt quaſhing an Order of Seſſions, which (upon Appeal to them, by Mr. *Gayer*,) diſcharged an Order of two Juſtices appointing *James Gayer* Eſq; and *Benjamin Cobley* to be *Overſeers* of the Pariſh of *Rockbear in Com. Devon.*

Mr. *Gayer* alone appealed from this order of Appointment; and the Seſſions diſcharged it, as to the Appointment of Mr. *Gayer* only: [The Words of the Order are—" *It appearing unto* this Court that *&c*, and alſo *&c*, *and that &c*;
" This Court doth THEREFORE vacate and make void the ſaid Warrant, as to the ſaid *J. Gayer.*"] It appearing unto them, that he had ſome Years been, and was at the Time of the Nomination, and ſtill at the Time of making the Seſſions Order, an ACTING JUSTICE *of Peace* for the ſaid County, reſiding within the ſaid Pariſh of *Rockbear*, and a ſubſtantial Houſekeeper there; And alſo a *Lieutenant of Marines in his Majeſty's Service, on Half-Pay*; And that there are *other ſufficient* ſubſtantial Houſeholders within the ſaid Pariſh, for the doing ſuch Office. The Court " THEREFORE vacated and made
" void the ſaid Warrant, as to the ſaid *James Gayer.*"

Mr. *Norton* had, on 13th *November* 1756, moved to quaſh this Order of Seſſions: For that *neither of theſe two Reaſons* were ſufficient to juſtify the Seſſions in quaſhing the Order of two Juſtices, whereby Mr. *Gayer* was legally and regularly appointed One of the Overſeers of the ſaid Pariſh.

And a RULE was thereupon granted, " to ſhew Cauſe."

On ſhewing Cauſe, The Counſel on both Sides went (at large) into a long Argument, " Whether the Reaſons *given*
" were ſufficient:" Particularly, " Whether the *Office* of
" Juſtice of Peace, and the Office of Overſeer, were *com-*
" *patible*;" and " Whether the Objection could be removed
" by appointing a *Deputy*-Overſeer;" If it could, then,
" Whether

" § Whether a Juſtice of Peace was *liable* to be appointed § P. 246:
" Overſeer, in order to his executing the Office by Deputy."

Lord *Manſfield* ſaid, the *General* Queſtions concerning the *Incompatibility* of Offices, and the *Power of appointing Deputies*, are a large field indeed: But the *preſent* Queſtion ſeems to turn in a very narrow Compaſs.

The *Seſſions*, upon an Appeal, have a Right to exerciſe the *ſame Latitude of Diſcretion*, in judging " Who are fit to be " Nominated Overſeers," as the two Juſtices had. They have given their Opinion " That Mr. *Gayer* was *not a proper Perſon* to be appointed Overſeer." They are *not obliged* to give *any* Reaſon for their Opinion; becauſe the Legiſlature has intruſted them, upon an Appeal, with the Power or authority of appointing Overſeers.

If they had given *no* Reaſon, their order had undoubtedly been good: We muſt have *preſumed* that they acted upon *proper* Grounds.

It is true, that where the *whole* Reaſon is ſet out, and is *clearly wrong*, We may and ought to quaſh an Order *manifeſtly* made by Miſtake, upon an erroneous Foundation.

But then the bad Reaſon given muſt appear to have been their *only* Inducement. If there may have been *other* Grounds, they ſhould be preſumed ſufficient: And the Order ought not to be ſet aſide, becauſe *ſome* of their Reaſons, unneceſſarily given, appear to be bad.

There was *no Neceſſity* for appointing Mr. *Gayer*: The Seſſions ſtate " that there were other ſufficient ſubſtantial Houſe-" holders within the ſaid Pariſh." They might think Mr. *Gayer*, under *all* the Circumſtances, improper *unneceſſarily* to be appointed: His being an acting Juſtice of Peace reſiding within the Pariſh, and a Lieutenant of Marines, might be two Circumſtances which weighed among *others*. But it don't follow, neither is it ſaid, that they looked upon both or either of theſe Reaſons, as an *Exemption* from being appointed, or a *Diſability* to ſerve the Office of Overſeer; and that they vacated the Warrant of two Juſtices *as illegal* upon *that* Account.

The Execution of a Diſcretionary Power, where it is not neceſſary to give a Reaſon, ought to be ſupported; *unleſs* the *whole* Reaſon is ſet out and *manifeſtly wrong*. Here, the *whole* Reaſon upon which the Seſſions acted, *is not* given. They ſay there were Other Perſons, qualified. Suppoſing Mr. *Gayer liable* to ſerve the Office, they might think Him *not* ſo *proper* as many *Others*. And therefore We are not obliged

‡ P. 247. ‡ obliged to ſay "that the *whole* Reaſon they went upon, "is bad;" allowing (for Argument) that there aroſe *no legal* Objection to the Appointment of Mr. *Gayer:* Which, I think, there is no Occaſion now to examine.

Mr. Juſtice *Deniſon* concurred.

They were not *obliged* to give *any* Reaſon at all: And if it be *only an imperfect One*, We ought *not* to quaſh their Orders.

He added—I remember a Caſe, (*Rex* v. *Spalding*, I think it was,) Where the Juſtices held a Man ſettled in a Pariſh, by reaſon of an Apprenticeſhip; Not ſaying "That He had "*ſerved* 40 *Days* in the Pariſh, under it:" Yet the Court would *not intend* that they did *wrong*.

We will *intend* EVERY *thing in* FAVOUR of the Juſtices, in their Orders.

Now here, the Reaſon *does not appear* to be a *wrong* Reaſon: It is enough, that *they judged* him an IMPROPER PERSON *to be Overſeer*.

Mr. Juſt. *Foſter* concurred.

Per Cur, unanimouſly.
ORDER of SESSIONS confirmed:
ORDER of TWO JUSTICES quaſhed.

Thurſday, 10th February 1757.

Rex *verſ.* Inhabitants of Chidingfold.

See this CASE abridged in the TABLE; and at large in the Quarto-Edition of my SETTLEMENT-CASES, No. 132. pa. 415.

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† P. 248. Saturday, 12th February 1757.

† Plummer *verſus* Bentham.

THE Recorder of *London* (Sir *William Moreton*) came to the Bar, and CERTIFIED two *Cuſtoms* of that City, ORE TENUS.

Mr. *Williams* moved, (when Sir *William Moreton* was down at the Bar,) that the Recorder of *London* might return two Writs

Writs of *Certiorari* directed to the Lord Mayor and Aldermen of *London*, to certify two of the Cuſtoms of their City.

And then Mr. *Williams* opened the Caſe, *viz.* That it was an Action of Treſpaſs on the Caſe brought by the Plaintiff againſt the Defendant, for *obſtructing his ancient Lights*, by a *new Erection or Building* which the Defendant had raiſed againſt them: To which, The Defendant had, (by Leave,) pleaded two Juſtifications, Both of them under the Cuſtom of the City of *London*. One of them was, that there is an ancient Cuſtom in the City of *London*, " That if any Perſon has a " Meſſuage or Houſe in the City of *London*, adjoining or con- " tiguous to another MESSUAGE OR HOUSE or to the anci- " ent *Foundations of One* in the ſaid City, which former Houſe " has *ancient Lights or Windows* fronting oppoſite to or over " ſuch other adjoining or contiguous MESSUAGE OR HOUSE " or ancient *Foundation of one*; Such *other* Perſon, *Owner of* " *the* LATTER *Meſſuage or Houſe* or ancient *Foundation of* " *One*, may well and lawfully *exalt* ſuch his *Meſſuage or* " *Houſe* or *rebuild upon the ancient Foundations* of ſuch his " adjacent or contiguous MESSUAGE OR HOUSE any *new* " *Meſſuage or Houſe*, to ANY HIGHTH *that he ſhall pleaſe*, " *againſt and oppoſite to the ſaid ancient Lights and Windows* " of ſuch firſt-mentioned neighbouring Meſſuage or " Houſe to which his *Meſſuage or Houſe* or ancient Founda- " tions of a *Meſſuage or Houſe* are ſo contiguous or ad- " joining; and *thereby darken and obſcure* ſuch ancient " Lights and Windows of ſuch firſt-mentioned neigh- " bouring Houſe, having ſuch ancient Lights and Win- " dows: Unleſs there has been ſome Writing Inſtrument " or Record of an Agreement or Reſtriction to the con- " trary."

† On this Plea, Iſſue was joined: And a *Certiorari* iſſued, †Page 249. directed to the Mayor and Aldermen of the City of *London*, to certify " Whether they have or have not ſuch a Cuſtom."

The ſecond Plea, Iſſue, and *Certiorari*, were the ſame with the firſt, only with this Difference or rather *Extenſion* of the Cuſtom pleaded; *viz.* " That the Owner of " any ERECTION OR BUILDING or the ancient Founda- " tion of any ERECTION OR BUILDING, might well and " lawfully exalt ſuch ERECTION OR BUILDING, to erect " and build thereon a new ERECTION OR BUILDING to " any Highth that he pleaſes, *&c.*" and ſo on, as in the former plea: Only that the former Plea confined the Claim of the Privilege, to *Meſſuages* or *Houſes*; which this latter Plea extends to *all Erections or Buildings*.

Sir *William Moreton*, Knt. Recorder of *London*, accordingly *certified* ORE TENUS, by Command of the Lord Mayor

or and Aldermen, (after having recited the Pleadings and *Certiorari,)* " That there ‖ *is* ſuch a Cuſtom as is alledged in " the *former* Plea : But that there is NO ſuch Cuſtom as is al- " ledged in the *latter* Plea."

‖ See the firſt Caſe in Sir H. Calthrop's Reports (prettily reported and worth reading ;) where the Queſtion was very like the preſent, and the Determination agreeable to the Certificate as to this firſt Plea.

The Recorder then delivered in both the Writs of *Certiorari*, with *written Copies* of the reſpective Returns annexed ; though He had delivered them *Ore tenus* at the Bar : (Which, he told me, was uſual.) The Returns were worded as follows ; *viz.* The Execution of this Writ appears in a certain Certificate by Us the Mayor and Aldermen of the ſaid City of *London*, made by the Recorder of the ſaid City at the Day and Place within contained, according to the Cuſtom of the ſaid City, by Word of Mouth, as is within commanded.

The Anſwer of Marſhe Dickinſon, *Eſq*; *the Mayor, and of the Aldermen of the ſaid City.*

We the ſaid Mayor and Aldermen of the ſaid City, by Sir *William Moreton*, Knt. Recorder of the ſaid City, by Word of Mouth of the ſaid Recorder, according to the ſaid Cuſtom of the ſaid City, Do, in Obedience to the ſaid annexed Writ, humbly certify That there is now had, and from the Time whereof the Memory of Man is not to the contrary there hath been had and received ſuch ancient and laudable Cuſtom in the ſaid City uſed and approved ; to wit, " That if any One hath a Meſſuage or Houſe in the " ſaid City, near or contiguous and adjoining to *another* " *ancient* MESSUAGE OR HOUSE, or to the ancient *Foun-* " *dation of another ancient* MESSUAGE OR HOUSE in the ſaid " ‡ City, *of another Perſon his Neighbour* there ; And the ‡ Page 250. " Windows or Lights of *ſuch Meſſuage or Houſe* are look- " ing fronting or ſituate towards upon over or againſt the " ſaid *other* ancient MESSUAGE OR HOUSE or ancient *Foun-* " *dation* of ſuch other ancient MESSUAGE or HOUSE of ſuch " *other Perſon his Neighbour*, ſo being near adjacent con- " tiguous or adjoining, *Although* ſuch Meſſuage or Houſe " and the Lights and Windows thereof be or were *An-* " *cient*, YET ſuch *other Perſon his Neighbour*, being the " Owner of ſuch other Meſſuage or Houſe or ancient " *Foundations* ſo being near adjacent or adjoining, by and " according to the Cuſtom of the ſaid City in the ſame " City for all the Time aforeſaid uſed and approved, *well* " and *lawfully may*, might and hath uſed, at his Will and " Pleaſure, his *ſaid other* Meſſuage or Houſe ſo being " near adjacent or adjoining, by Building *to exalt or erect* ; " or, of new, upon the Ancient *Foundations* of ſuch *other* " Meſſuage or Houſe ſo being near adjacent or adjoin- " ing *to build and erect a new Meſſuage or Houſe* to SUCH " HIGHTH as the SAID Owner SHALL *pleaſe*, *againſt*

" and

" and *oppoſite* to the ſaid *Lights and Windows* near or contiguous to ſuch OTHER MESSUAGE OR HOUSE, and by " Means thereof TO OBSCURE AND DARKEN ſuch Windows " or Lights: Unleſs there be or hath been ſome Writing Inſtrument or Record of an Agreement or Reſtriction to the " contrary thereof in that Behalf."

The Return to the other Writ of *Certiorari* was in the ſame Form, and to the very ſame Effect as to the Cuſtom certified by the former; and repeated the Return to the former *Certiorari in totidem verbis*, very nearly: But it went on further, with a *Negation* of the Exiſtence of any ſuch Cuſtom as the Defendant had alledged in his *ſecond* Juſtification. The Additional Part was as follows.

And that in the ſaid City of *London* there is NOT now or ever was any ſuch Cuſtom, " That if any One hath a Meſ- " ſuage or Houſe in the ſaid City, near or contiguous and " adjoining to an ERECTION *or* BUILDING or to the ancient " Foundations of an ERECTION *or* BUILDING, in the ſaid " City, of another Perſon his Neighbour there; and the " Windows or Lights of ſuch Meſſuage or Houſe are look- " ing fronting or ſituate towards upon over or againſt ſuch " ERECTION *or* BUILDING or the ancient Foundations of " ſuch ERECTION *or* BUILDING of ſuch other Perſon his " Neighbour ſo being near adjacent contiguous or adjoin- " ing: Although ſuch Meſſuage or Houſe and the Lights " and Windows thereof be or were ancient, Yet ſuch other " Perſon his Neighbour, being the Owner of ſuch EREC- " TION *or* BUILDING or ancient Foundations of ſuch ERECTION *or* BUILDING ſo being near adjacent or adjoining, " by and according to the Cuſtom of the ſaid City in the " ſame City for all the Time aforeſaid uſed and approved, " ‡ well and lawfully may might and hath uſed, at his ‡ P. 251. " Will and Pleaſure, his ſaid ERECTION *or* BUILDING ſo " being adjacent or adjoining, by Building to *exalt and* " *erect*; or, if new, upon the ancient Foundations of the " ſaid ERECTION *or* BUILDING ſo being near adjacent or " adjoining to build and erect a *new Erection or Building*, to " SUCH HIGHTH *as the Owner ſhall pleaſe*, againſt and op- " poſite to the ſaid Lights and Windows of ſuch Meſſuage or " Houſe, and by means thereof to obſcure and darken ſuch " Windows or Lights."

The Court ordered the *Certiorari* to be filed, and the *Return* RECORDED.

Note—Nothing of this kind has actually happened for many Years paſt, (not even ſince *H.* the Sixth's Reign,) in *this* Court;) though it has in the Court of Chancery,) And a Conſultation was had in the City, concerning the

the Sort of Gown which it was proper for the Recorder to put on, to make this *Ore-tenùs* Return: In which Conſultation, it was determined that it ought to be the Purple Cloth Robe, faced with black Velvet; and not his Scarlet Gown, his Black Silk One, nor the Common Bar-Gown.

See *Viner*'s *Abridgment*; Title *Cuſtoms of London*, Letter P. *placita* 2 & 4. concerning this Manner of trying the Cuſtoms of *London*: and how to *ſurmiſe* "that they ought to be tried thus, and not by the Country:" 'Tis in *Vol.* 7. *Page* 246. Note—*Without* ſuch a *Surmiſe*, they ſhall be tried by the Country, as other Iſſues in Fact are.

Rex *verſ.* Strong.

MR. Serjeant *Poole* ſhewed Cauſe againſt quaſhing an Indictment on 5 *Eliz. c.* 4. *ſect.* 31. (for exerciſing a Trade, not having ſerved an Apprenticeſhip therein,) found at the Seſſions for the CITY of *Carliſle*.

Mr. *Norton* had (on the 27th *November* 1756) moved to quaſh it, upon an Objection, "that the *City*-Seſſions had NO *Juriſdiction*." And He had cited, in Proof of it, The Caſe of *Regina* v. *Taylor*, 2 Ld. *Raym.* 767. Where ſuch an Indictment was quaſhed, "becauſe the BURROUGH Seſſions "had *no Juriſdiction* to take ſuch Indictments." He inſiſted that ONLY the *Quarter*-Seſſions of the COUNTY have Juriſdiction. The Indictment in that Caſe of *Taylor*, was found at the Seſſions for the *Corporation* of *Wells*; and moved hither by *Certiorari*.

‡ Page 252. ‡ Lord *Mansfield*, at the Time of the original Motion, looked into the Act of 5 *Eliz. c.* 4. and ſaid that this Act [*ſ.* 39.] expreſsly gives the Power to Mayors or other Head Officers of *Cities* or *Towns Corporate*, at THEIR Seſſions.

And now, upon ſhewing Cauſe,

The COURT was unanimouſly of that Opinion.

The Caſe of the *Queen* againſt *Taylor* was in *Eaſter* Term 1702, 1 *Annæ*; And is *contradicted* by that of *Regina* v. *Franklyn*, in 2 *Ld. Raym.* 1038. which was determined in *Mich.* 3 *Ann.* 1704. though it is in 1 *Salk.* 370. by *Miſtake*, put under *Mich.* 3 *Will. & Mar.*

Per Cur. RULE DISCHARGED.

MEMO-

MEMORANDUM.

The COURT was not up till near an Hour after Midnight; though many Rules were enlarged, and many long Motions adjourned over till next Term.

AS the Regulation made by the Court concerning VIEWS took its *Riſe* in this Term, it may be proper *here* to ſtate every Thing relative to that Subject; which, *at the Time of this Publication*, is a Practice fully ſettled.

The Granting of Rules for VIEWS in ‡ *Civil* Cauſes ſtands § now ſettled upon the following Foot.

‡ N. B. 4, 5 Ann. c. 16. §. 8. does not extend to Criminal Caſes. So that in them there can be no Rule for a View, without mutual Conſent.

§ In 1765.

GREAT INCONVENIENCE had ariſen from the *Abuſe* of Views and their being perverted into Means of DELAY, to the intolerable Hindrance of Juſtice. Some late Inſtances ſhewed the Miſchief in a glaring Light: and the Example being once ſet, there was no doubt it would be followed.

‡ *After* the 4 & 5 *Ann. c.* 16. *ſect.* 8. Views were granted, upon Motion, *of Courſe*. And upon this Act and 3 *G.* 2. *c.* 25. *ſect.* 14. a Notion prevailed "That *Six of the firſt Twelve* "upon the Pannel muſt view, and appear at the Trial: If "they did not, there could be no Trial, and the Cauſe muſt "go off."

‡ P. 253.

Where *either* Party wiſhed Delay or Vexation, He moved for a View. A thouſand Accidents might prevent a View, or Six of the firſt Twelve from attending the View, or their attending the Trial. He who wiſhed them not to attend, might by various Ways bring it about. Where a Defendant in Poſſeſſion was well liked, and the Plaintiff a Stranger or unpopular, Gentlemen of themſelves found Excuſes; eſpecially, if the View was troubleſome and at a Diſtance. Cauſes in ſeveral Counties had at a great Expence been repeatedly carried down, and put off; either becauſe there was no View, or becauſe Six of the firſt Twelve did not attend the View or did not attend the Trial. Though Twelve Viewers ſhould appear

at

at the Trial, yet according to the Notion which prevailed, if *Six of the firſt Twelve* upon the Pannel were not among them, the Cauſe could not be tried.

The Tendency of this Abuſe, to Delay, vexatious Expence and the Obſtruction of Juſtice, was ſo manifeſt, that the Court thought it their Duty to conſider of a Remedy: And in *Michaelmas* Term 1757, and at other Times Lord *Mansfield* informed the Bar to the following Effect, "That they had conferred together upon the ABUSE of "Views, and conſidered of a Remedy in the Power of the "Court."

Before the 4 & 5 *Ann. c.* 16. *ſect.* 8. there could be no View till *after* the Cauſe had been brought on to Trial. *If* the Court ſaw the Queſtion involved in Obſcurity which might be cleared up by a View, the Cauſe was put off, that the Jurors might have a View before it came on to be tried again. The Rule for a View proceeded upon the previous Opinion of the Court or Judge, *at* the Trial, "that the "Nature of the Queſtion made a View not only proper, "but *neceſſary*:" For the Judges at the Aſſizes were not to give way to the Delay and Expence of a View, unleſs they ſaw that the Cauſe could not be underſtood without one. However, it often happened in Fact, that upon the Deſire of either Party, Cauſes were put off for want of a View, upon ſpecious Allegations from the Nature of the Queſtion, "that "a View was proper;" without going into the Proof, ſo as to be able to judge whether the Evidence might not be underſtood without it.

• Page 254. • This Circuity occaſioned Delay and Expence: To prevent which, the 4 & 5 *Ann. c.* 16. *ſect.* 8. impowered the Courts at *Weſtminſter* to grant a View in the firſt Inſtance, *previous* to the Trial.

As a View *might* be of Uſe, and in *this* Shape was attended with *no Delay* and but little Expence, it became the Practice to grant them *of Courſe*, upon the Motion of *either* Party.

The 3 *G.* 2. *c.* 25. *ſect.* 14. provides "that *where* a View "ſhall be *allowed*, the Jurors who have had the View ſhall "be firſt ſworn, (or ſuch of them as ſhall appear,) before any "Drawing:" Which means, in Oppoſition to ſuch other Jurors as are to be drawn by *Ballot*; and *not* to eſtabliſh "that "Six at leaſt of the *firſt Twelve* ſhall be ſworn."

Upon a ſtrict Conſtruction of theſe two Acts, *in Practice*, the *Abuſe* which is now grown into an intolerable Grievance has ariſen.

Nothing

Nothing can be plainer than the 4 & 5 *Ann. c.* 16. *ſect.* 8. The Courts are *not bound* to grant a View of *Courſe*: The Act only ſays "they *may* order it, where it ſhall *appear to them* "that it will be *proper and neceſſary*."

It is infinitely better that a Cauſe ſhould be tried upon a View had by *any Twelve*, than by *Six* of the *firſt* Twelve; or by *any Six*; or by *fewer* than Six; or even without any View at all; than that the Trial ſhould be DELAYED *from Year to Year*, perhaps for ever: It can never be *proper or neceſſary* to grant a View which is aſked and uſed for ſo *unjuſt* a Purpoſe.

There have been Inſtances of great Cauſes put off for Years: And though even nine ten or eleven Viewers have attended, yet upon Objection "that they were not Six of "the *firſt Twelve*," the Cauſe has been put off, and a View moved for, as of Courſe, again, by the Party who had availed Himſelf of ſo glaring a Chicane.

We are All clearly of Opinion, that the Act of Parliament meant a View ſhould not be granted, *unleſs* the Court was *ſatisfied* that it was PROPER AND NECESSARY.

The *Abuſe* to which they are now perverted makes this Caution our indiſpenſable Duty: And therefore upon every Motion for a View, We will hear both Parties, and examine (upon all the Circumſtances which ſhall be laid before Us on both Sides) into the *Propriety and Neceſſity* of the Motion; Unleſs the Party who applies will conſent to and move it upon *Terms* which ſhall prevent an Unfair Uſe being made of it, to the Prejudice of the other Side and the Obſtruction of Juſtice.

* LORD MANSFIELD having made this Declaration, His Lordſhip deſired the Gentlemen of the Bar to think of it; and, if any Objections ſhould occur, to mention them. * P. 255.

The Expedient propoſed by the Court was univerſally approved.

The firſt Inſtance happened in *Hilary* Term 1757, in a great Cauſe between *Pierce* and the Earl of *Faulconberg* and Others; which was an Iſſue out of Chancery, often tried at *Durham* by Special Juries, and now ordered to be tried at Bar by a Special Jury from *Yorkſhire*. (See the Rule at large, together with the *Addition* of the Conſent-Part, *infra*, *pa.* 256, 257.)

Subſequent to this, was the Cauſe of the Earl of *Darlington* v. *George Bowes*, Eſq; which was an Iſſue out of Chancery, and had been thrice carried down to be tried at *Dur-*

ham (where there are Aſſizes only once a Year) at a great Expence, and every Time put off by the Defendant upon Objections on Account of the View. Once, nine Viewers appeared: But they were not Six of the firſt Twelve. Another Time only four Viewers appeared at the Aſſizes. In 1757, a View was granted by mutual Conſent, upon Terms: But by an Accident (of a Fall from his Horſe) the Judge of Aſſize was prevented from trying it. The Defendant *Bowes* moved, in *Trinity* Term 1758, for a View; but refuſed to renew his former Conſent, or to come into any Terms; inſiſting that by Law he was intitled to a View, of Courſe. The Plaintiff had likewiſe moved for a View; conſenting to the Terms. Both Motions were adjourned to the laſt Day of the ſame *Trinity* Term, 1758; When the Court, upon all the Circumſtances, rejected the Defendant's Motion, unleſs he ſhould conſent (within a Week) to the Terms propoſed. He would not conſent. The Cauſe came on to be tried at *Durham*, without a View, before Mr. Baron *Smythe*. It happened, many of the Jurors had viewed upon ſome of the former Occaſions. A Verdict was given, for the Plaintiff, to the Satisfaction of the Judge. The Defendant moved the Court of Chancery for a new Trial; becauſe He had been refuſed a View; and becauſe it might be fit to have another Trial, before his Inheritance was bound. Mr. Baron *Smythe* certified "that he was ſatisfied with the Ver-"dict;" and alſo, "that a View was totally unneceſſary, "there being no Diſpute concerning the Locality Diſcrimina-"tion or Limits of the Premiſſes, but merely a Queſtion To "Whom certain Lands belonged." The Court of Chancery thought proper to grant another Trial; but approved the denying a View, *unleſs* he renewed his Conſent; and made it Part of the Order for a New Trial, "That He *ſhould* conſent "to the Terms." It was again tried, before Mr. Juſtice *Bathurſt*: ‡ And a Verdict was found for the Plaintiff, to his Satisfaction. The Defendant moved the Court of Chancery for a new Trial: Which was refuſed.

‡ P. 256.

Had not the Court put a *Check* to granting Views, from Time to Time, as of *Courſe*, a rich Defendant, conſcious that the Merits were againſt Him, might from Pique or Humour or Litigiouſneſs, have kept off the Cauſe as long as he lived, for want of a View, upon a Queſtion where a View could not be of the leaſt Utility.

The Wiſdom and Fitneſs of what the Court had done to regulate Views was ſo fully manifeſted upon the Occaſion of this Cauſe, and appeared to be ſo well juſtified by the Authority given them by the Act of Parliament and by every Principle of Juſtice and Convenience, that no Party has ever ſince moved for a View, without conſenting to the Terms: And it is found in Experience, that Views are ¶ now regularly had, and a competent Number of Viewers appear at the Trial. A View is not aſked * now, except in

¶ At the time of this Publication, (1765.)

* V. ſupra.

in Caſes where it may probably be of Uſe: And as the Non-Attendance of Viewers can now gratify neither Party, Both concur in wiſhing the Duty performed.

The Rule that was made in the firſt Inſtance that happened after the Expedient was propoſed by the Court, and was received with general Approbation as is above mentioned, was drawn up in the following Words.

" † *Saturday* next after 15 Days of St. *Hilary* in the 30th † 29th Jan.
" Year of King *George* the 2d. 1757.

" *Pierce*, Eſq; *v.* Earl *Faulconberg* and Others.

" By Conſent of Counſel on both Sides, It is ordered, that
" there Iſſue a Writ of *Diſtringas Juratores*, to be directed to
" the Sheriff of the County of *York*; in which ſhall be con-
" tained a Clauſe commanding the ſaid Sheriff to have Six or
" more of the firſt Twelve of the Jurors to be impanelled and
" returned to try the Iſſue between the Parties, at the Place
" in Queſtion, before the Time of the Trial of the ſaid Iſſue,
" to wit, upon, *&c.* And that *B. R.* on the Part of the Plain-
" tiff, and *T. W.* on the Part of the Defendants, ſhall attend
" on the ſame Day and ſhew the Matters in Queſtion to the
" ſaid Six or more of the firſt Twelve of the ſaid Jurors;
" And that the Expences of taking the ſaid View ſhall be
" equally borne by both Parties: And no Evidence ſhall be
" given, on either Side, at the Time of taking thereof."

† " ¶ AND by the like Conſent, It is further ordered, that † P. 257.
" in caſe NO *View* ſhall be had; Or if a View ſhall be had
" by ANY of the ſaid Jurors, (whether they ſhall happen to
" be any of the *twelve* Jurors who ſhall be FIRST *named* in
" the ſaid Writ, or not;) yet the ſaid Trial ſhall proceed;
" And *no Objection* ſhall be made on either Side, either for
" *want* of a View or that a View was not had by any of the
" *twelve Jurors firſt* named, or for that it was not had by any
" *particular Number* of the Jurors named in the ſaid Writ, or
" for want of a *proper Return* to the ſaid Writ.

" On the Motion of Mr. *Norton*, of Counſel for the Plain-
" tiff; and Mr. *Gould*, of Counſel for the Defendants."

The Cauſe was tried at the Bar, on the 7th of *May* 1757: And a full Jury of Viewers appeared.

¶ Note—The former Clauſe of this Rule was in the uſual Form of Rules for Views where the Trial was to be by a Special Jury.
But this latter Clauſe (" And by the like Conſent it is further order-
" ed, &c.") was now firſt added.

The above recited Rule was for a View to be had by a *Special* Jury; and was made abſolute at once, being conſented to by both Parties: But during the Remainder of the ſame Term (of *Hilary* 1757,) and alſo during the three following Terms (of *Eaſter*, *Trinity*, and *Michaelmas* 1757.) The Court, upon proper Affidavits, granted like Rules (*mutatis mutandis*) in Caſes that were to be tried by *Common* Juries; making them only "to ſhew Cauſe," not abſolute in the firſt Inſtance. The next Term (*Hilary* 1758,) They made ſome of them "to "ſhew Cauſe;" Others, abſolute in the firſt Inſtance; but none without proper Affidavits. Soon after, *viz.* in *Trinity* Term 1758, They made all theſe Rules abſolute in the firſt Inſtance; Some, upon Affidavit; Others, as of Courſe: Since which Time, they are become Motions of Courſe, without Affidavit.

The form of them is as follows——

If the Trial is to be by a *Special* Jury, the Rule runs thus—

It is ordered that there Iſſue a Writ of *Diſtringas Juratores*, *&c. &c.*—taking thereof: [in the Words of the *firſt* Clauſe of the above recited Rule between *Pierce* and Lord *Faulconberg* and Others. ‡] The *additional* Clauſe is expreſſed in theſe Terms—"The Plaintiff, [or the Defendant, *viz.* the Party "who prays the View] conſenting that in Caſe *no* View ſhall "be had: Or if a View ſhall be had by *any* of the ſaid Jurors, "whether they ſhall happen to be any of the *twelve* Jurors "who ſhall be *firſt* named in the ſaid Writ, or not; Yet the "ſaid Trial ſhall proceed; and no † Objection ſhall be "made, on either Side, on Account *thereof*, or for *want of a* "*proper Return* to the ſaid Writ."

‡ See laſt Page.

† P. 258.

The Rule for a View, where the Cauſe is to be tried by a *Common* Jury, could not continue the ſame, *ſince* the balloting Act (3 *G.* 2. *c.* 25.) as it was *before*; nor could it be *exactly* like to that for Views by *Special* Juries, (by reaſon of the particular Direction given by the 14th Section of the balloting Act:) But it uſed to run much like it, only *mutatis mutandis*. The *preſent* Form (ſince that Act,) is this—"It is ordered that there iſſue a Writ of *Diſtringas* "*Juratores*, to be directed to the Sheriff of the County of "*Y.* in which ſhall be contained a Clauſe commanding "the ſaid Sheriff to have Six or ſome greater Number of "*the* ¶ *Jurors* to be impanelled and returned to try the "Iſſue between the Parties, * *Who ſhall be mutually conſent-*"*ed to by the ſaid Parties or their Agents*, at the Place in "Queſtion, before the Time of the Trial of the ſaid Iſſue, "to wit, upon, *&c.* And that *R. R.* on the Part of the "Plaintiff,

¶ N.B. This Act (of 3 *G.* 2.) does not require them to be Six of the firſt Twelve.

* Theſe Words are taken from the ſame Act of Parliament, ſect. 14.

" Plaintiff, and *T. W.* on the Part of the Defendant, ſhall at-
" tend on the ſame Day, and ſhew the Matters in Queſtion to
" the ſaid Six or ſome greater Number of the ‡ *ſaid Jurors,* ‡ V. ſupra,
" *who ſhall be mutually conſented to as aforeſaid*; And that the Notes (¶)
" Expences of taking the ſaid View ſhall be equally borne by (*)
" both parties: And no Evidence ſhall be given, on either
" Side, at the Time of taking thereof."

The *Additional* Clauſe, now added to this Rule, is in theſe Words—" the Plaintiff," or " The Defendant," [the Party at whoſe Inſtance the Rule is prayed] " CONSENTING that
" in Caſe NO *View* ſhall be had; Or if a View ſhall be had
" by ANY of the Jurors, whether they ſhall happen to be
" Six ¶ *or any particular Number of the Jurors* ¶ *who ſhall be* ¶ V. ſupra
" *ſo mutually conſented to as aforeſaid*; Yet the ſaid Trial ſhall Notes (¶)
" proceed; and no Objection ſhall be made on either Side, (*)
" on Account *thereof*, or for *want of a proper Return* to the
" ſaid Writ."

The End of *Hilary* Term 30 *Geo.* 1757.

Eaſter

* Page 258.

* Easter Term.

30 Geo. 2. B. R. 1757.

Three Judges present, *viz.*

Lord Mansfield;
Mr. Juſt. Deniſon, *and*
Mr. Juſt. Foſter.

(Lord Commiſſioner *Wilmot* abſent, in Chancery.)

Friday, 29th April, 1757.

Cooper *verſ.* Marſhall.

THIS Caſe was the ſame Point with a Caſe of *Cope* v. *Marſhall*, which had been formerly twice argued, (*viz.* on 28th *June* 1754, and 31ſt *January* 1755.) Both of them ſtood now in the Paper, for Argument; The preſent Caſe having been never argued at all, and the other having never been argued either before Lord *Mansfield* or Mr. Juſtice *Wilmot*.

This Caſe of *Cooper* v. *Marſhall* ſtood firſt in the Paper, and came on firſt. It was an Action of Treſpaſs for breaking entering and *digging up* the Plaintiff's *Cloſe*, and *filling up and ſpoiling the Coney-burrows* there, &c. And there was a 2d Count for doing the like in the Plaintiff's *Free Warren*.

Several Pleas were pleaded, by Leave of the Court.

Plea—As to the 1ſt Count, was a Juſtification under a *Right of Common* in 20 Acres, &c. And that the Coney-burrows were wrongfully unlawfully and injuriouſly newly-erected

† ed and kept up there: By reaſon whereof the ſaid Common was *ſurcharged and ſpoiled*; So that the Defendant could not enjoy *ſufficient* Common in the ſaid 20 Acres, as of Right he ought. And therefore He juſtifies the breaking entering and *digging up* the Plaintiff's Cloſe, and *filling up and Spoiling* the Coney-Burrows, as it was lawful for Him to do, in order to abate the ſaid *Nuſance*. † P. 260.

There was alſo a ſecond Juſtification, much to the ſame Effect.

To the 2d Count—Were Two Juſtifications not much different from the former.

The Plaintiff demurs to theſe Pleas: And the Defendant joins in the Demurrer.

Mr. *Morton pro Quer.*—The Juſtification ariſes merely from the Plaintiff's having *ſurcharged* the Common: And the Wording of the Plea cannot alter the Matter and Subſtance of it. So that the Defendant's *calling* it a NUSANCE will not *make* it ſo: But it really is a *mere Surcharge of Common*. Therefore the Word "NUSANCE" is here miſapplied.

He cited *Cro. Jac.* 446. The Caſe of *Fowler* v. *Sanders*: Where the Preſcription was treated as a Preſcription to make a Nuſance, though not ſo expreſſed in *Terms*.

But it is not an illegal Act, for the Lord to *place Conies* upon his *own* Land; though the Land be liable to Right of Common. They are Beaſts of Warren, and profitable to the Lord: And the Commoner *cannot chaſe and kill* them.

Bracton, *Lib.* 4. 221. makes a Difference between a Nocumentum *juſtum*, and a Nocumentum *injurioſum*.

Fleta, *Lib.* 4. *c.* 26. *de Nocument' Servitutibus injurioſis*, makes the like Diſtinction: "Nocumentorum aliud, injurioſum *et* dampnoſum; et aliud, dampnoſum et *non* injurioſum."

Theſe Authorities ſhew that the Injury ariſes *only* from the *Exceſs*.

And the Commoner has *no ſuch* Remedy, as the Defendant here relies on.

The Queſtion therefore is "Whether the Commoner has "a Right to DIG UP *the Lord's Soil*; in order to preſerve his "Right of Common."

The

* P. 261. * The Lord cannot indeed *totally deſtroy* the Commoner's qualified Intereſt, contrary to his own Grant. Yet the Lord has Rights *compatible* with the Commoner's Right: And theſe are legal in their *own Nature*; though they may *become* injurious, by *Exceſs*.

On which Head, he cited *Fleta*, *Lib.* 4. *Pa.* 252. [*V. Pa.* 252, 253, in *Cap.* 18. *de pertinentiis.*]

But this Juſtification puts the latter Caſe upon the ſame Foot with the former: Whereas the Commoner's Remedy is, *really*, adequate only to the Injury done to Him. Now a Surcharge of Common is of the latter kind of Injury: And yet He here claims a Right *to dig up* the Soil and *deſtroy* the Conies. So that the Remedy claimed by the Juſtification EXCEEDS *the Injury done*. And indeed it would go further than a judgment upon a Writ of Admeaſurement would carry it: for which, He referred to *Fitzh. Nat. Brev.* 295. [276.] and *Weſtm.* 2. *c.* 8. [13 *E.* 1.] There, the Tenant who is guilty of a ſecond Surcharge ſhall only pay Damages, and forfeit the Overcharge to the King; Whereas what is here claimed, is a *total Confiſcation* of the Lord's Property, for his firſt Injury done to the Commoner.

Authorities in Point, or nearly ſo, "That the Commoner "cannot do this," are *Godbolt* 122. *Coney*'s Caſe, *H.* 29 *Eliz.* which is full in Point: And the Principal Reſolution is confirmed by 4 *Leon.* 7. *Ould* and *Coney*'s Caſe, S. C. In which Caſe, it was adjudged "That the Commoner cannot kill or "*deſtroy* the Conies which deſtroy his Common:" But it appears by *Godbolt*, that "He may have other Remedy. And "*per Suit* Juſtice, he may have an Action of the Caſe or Aſ"ſize, againſt the Lord, for putting in the Conies, if he has "not a ſufficient Common left." Indeed it is ſaid in 1 *Leon.* 7. "That He hath *not* any *other* Remedy." But *Fleta*, *Lib.* 4. *c.* 23. *de admenſur. Paſturæ*, *pa.* 262, 263. juſtifies Mr. Juſt. *Suit*'s Opinion, "that He *has* Remedy;" *viz.* either Admenſuration, or Aſſize of Novel Diſſeiſin.

A Commoner cannot even *diſtrain* the Lord's Beaſts which ſurcharge a Common. For which Poſition he cited *Godbolt*, *ut ſupra*, *pa.* 124. as an Authority. [*V.* what is there ſaid *per Godfrey*, *arguendo*; but not any Part of the Reſolution of the Caſe.] Much leſs, then, can he *deſtroy* them.

Cro. Eliz. 876. *P.* 43 *Eliz.* The Caſe of *Bellew* v. *Langden*, the ſame Point, and adjudged accordingly; "that the "Keeping of Conies by the Owner of the Soil is lawful; "And the Killing them, unlawful." And *Owen* 114. S. C. (there called the Caſe of *Pellin* v. *Langden*,) S. P. accordingly:

Which

‡ Which adds, that the Owner of the Soil may make a Fiſh- ‡ Page 262.
pond upon the Common; and that the Commoner could not deſtroy it.

Yelv. 104. *Hoddeſdon Mil.* v. *Greſil, M.* 5 *Jac. B. R.* and *Cro. Jac.* 195. *P.* 5 *Jac.* S. C. there called *Hadeſden* v. *Griſſel*; It was adjudged "That the Commoner cannot *kill* nor *chaſe* "the Lord's Beaſts off the Common; But his Remedy is by "Aſſize, or Action on the Caſe."

Agreeable to this Reſolution—In a Caſe in *Cro. Jac.* 229. *M.* 7 *Jac.* 1. there called Sir *Jerom Horſey* v. *Hagberton*, a Plea very like the preſent, was over-ruled without Defence. The Caſe really was between Sir *Jerome Horſey* and *Mead and Havor and his Wife.* The Juſtification was, of *levelling the Coney-burrows*, and *laying them ſmooth and even with the Ground:*" And the Reaſon given for doing it, was, "that *uti non potuit* "his Common, *prout debuit.*" Adjudged, without Argument, "that the Commoner could *not* do this."

After this, the Commoners tried their Chance again, by altering their Manner of Pleading. This was in the Caſe in 2 *Bulſtr.* 116. *Carrill* v. *Pack and Baker, Tr.* 11 *Jac.*

Here, the Coney-burrows were treated, by the Juſtification, as *Holes* made upon the Common, by the Plaintiff, into which the Commoners Sheep often *fell into* thoſe Holes, and were thereby *loſt:* And therefore they juſtify the *chaſing* the Conies, and *digging and filling up* the Burrows.

And agreeably to this Caſe, the Pleading in the preſent Caſe is, "That the Plaintiff erected Coney-burrows, &c."

In that Caſe, all the Caſes and Arguments were urged: And yet it was adjudged againſt the Defendant; who had juſtified the *Chaſing* the Conies, and *digging down* the Burrows and *filling up* the Holes.

Since which Time, the Grand Point has never come in Queſtion.

Mr. *Aſton pro Def.*

In the firſt Place, it does *not appear* that the Defendant *did* KILL any of the Conies: though Mr. *Morton* would ſuppoſe that to be implied in his digging and filling up the Burrows.

The

‡ P. 263. ‡ The Lord may feed or depaſture the Common, I agree: And the Commoner cannot *kill* or *chaſe* his Cattle.

But it does not follow, that where *Neceſſity* obliges the Commoner to *abate a Nuſance*, he may not do it.

And Surcharging a Common with Rabbits in a great Degree, is a private *Nuſance*.

1 *Hawk. Pl. Cor.* 197. *c.* 75. treats of common Nuſances, and how they may be removed: And He ſays "that any One "prejudiced by a private Nuſance may deſtroy it." *Pa.* 199. *ſ.* 12. is expreſs.

2 *Rol. Abr. Tit. Indictment*, Letter Q. *Nuſance*, *Pl.* 7, 8. A Preſentment of a Surcharge of Common is not good: Becauſe it concerns a private Intereſt. The ſame, of an Incloſure of Common, in Nuſance of the Commoners.

Bracton, *Lib*, 4. *c.* 21. *Pa.* 221. ſhews that though the Act was *legal at firſt*, the *Exceſs makes it a Nuſance*.

But here the 2d Plea is "That the Lord has erected ſo "many Coney-burrows that the Commoner had *not ſufficient* "Common left." And this Fact is *admitted* by the Demurrer. Therefore the Lord has broken through the Bound of Right between the Lord and the Commoner.

The Lord cannot incloſe or build upon the Common.

And there are no *Degrees* of Inſufficiency: The Only Queſtion is "Whether there be or be not ſufficient Common left;" As in the Caſe in 2 *Mod.* 7. *Smith* v. *Feverel*.

And the Commoner may in ſuch Caſe abate the Nuſance. 2 *Inſt.* 88. is in Point. 15 *H.* 7. 10. *b.* is alſo in Point. He may ALSO, indeed, if he chooſes it, bring an Action of Treſpaſs or Aſſize. But he *may* abate them, *without* Suit. *Hale*'s *Analyſis* 110. [*V. pa.* 125. *ſ.* 42.] *Robert Mary*'s Caſe, 9 *Co.* 112. *b.* affords the Reaſon; *viz.* the preventing Multiplicity of Suits.

As to the Doctrine of the Commoner's not meddling with the *Soil*.

The Lord could approve *before* the Statute of *Merton*. 1 *Ro. Rep.* The Caſe of Sir *S. Proctor* v. Sir *J. Mallorie*; *per*

† *per Coke*; and agreed to by the Lord Chancellor. *Fitzh.* Title *Approvement* (there cited.) † P. 264.

And this appears too by the Writ of *Quod permittat. Bracton, Lib.* 4. *pa.* 227. *b.* (the Writ there) ſhews that the Commoner might pull down Pales &c. 2 *Inſt.* 88. *ad idem.*

This is like all other Caſes of Nuſance: A Perſon *may abate* a Nuſance to his Property, though upon the Land of another. 9 *E.* 4. 35. *a.* is ſo.

As to Mr. *Morton's* Caſes—There is no material Difference between deſtroying a *Hedge*, and deſtroying a *Coney-burrow*. Now 2 *Mod.* 65. The Caſe of *Cæſar* v. *Maſon* is in Point, "That the Commoner may proſtrate and "abate a *Hedge*:" And ſurely that is meddling with the *Soil.*

And there *may* be Caſes where the Commoner may chaſe off the Lord's Beaſts: As ſuppoſe they are infected.

As to *Coney's* Caſe, it was very different from the preſent: For there the *Killing and carrying away* was juſtified; Whereas We do not juſtify Killing, chaſing, or taking away.

So, the Caſe of *Bellew* v. *Langden* was *Killing.* There was no Pretence of any Surcharge of Common. It is a Juſtification of Killing the Conies as being Damage-feaſant: And it's only adjudged there "that the Killing them was "unlawful."

So *Yelv.* 104. was *chaſing* and *killing.*

And in thoſe Caſes, there *might be ſufficient* Common left, for aught that appears to the contrary, in any One of them.

Sir *Jerome Horſey's* Caſe is not like this. That is for breaking a *Warren*: And the Coney-Burrows there are not ſaid to be *newly* erected. And it was done *to prevent* the Coney-Burrows increaſing, *ſo as to be* a Nuſance: Not averring "That they were *then* a Nuſance."

Whereas here it is averred *to be* a Nuſance, and a *new* Erection.

As to the Caſe of *Carril* v. *Pack and Baker*—'Tis for entering the Plaintiff's Free Warren, and digging the Lands. And there, in the Juſtification, it is alledged to be done for the BETTER *Preſervation* of the Common. And the free Warren is admitted: And therefore he could not juſtify the *killing* &c.

As

† P. 265. † As to a Pond—If it was ſo large as not to leave ſufficient Common, it would be a Nuſance, and *might* be abated.

1 *Lutw.* 101. The Caſe of *Haſſard* v. *Cantrell* (which was mentioned on a former Argument) was only "that the "Commoner could not enjoy his Common *in ſo beneficial* "*and ample* a Manner as before." But it does not ſay, as here, "that there was *not ſufficient* Common left." Which is going a great deal further than that Caſe does.

Mr. *Morton* in Reply—

Mr. *Aſton* agrees that the Act of the Lord is *legal*. Therefore it is not like Acts which are againſt his own Grant; or Caſes which become *Manifeſta Diſſeiſina*.

"*Ulterius* Nocumentum" imports a *preſent* Nuſance—

Lord MANSFIELD ſtopped Mr. *Morton* in his Reply.

"Whether it be or be not *hurtful*;" or "how far it "may be ſo:" is not the Queſtion: The Queſtion turns upon the REMEDY; "Whether it is *Abatable*; Whether "the Commoner can do *Himſelf* Juſtice."

It may be *Prejudicial* to the Commoner, yet not *Injurious*: It may be both *Prejudicial and Injurious*, yet not *Abatable*.

The Lord, by his Grant of Common, gives *every Thing incident* to the Enjoyment of it, (as Ingreſs, Egreſs, &c.) And thereby *authorizes* the Commoner to remove every Obſtruction to his Cattle's Grazing the Graſs which grows upon ſuch a Spot of Ground: Becauſe every *ſuch* Obſtruction is directly *contrary* to the Terms of the Grant. A *Hedge*, a *Gate*, or a *Wall*, to keep the Commoner's Cattle *out*, is *inconſiſtent* with a Grant which gives them a Right *to come in*.

But the Lord ſtill remains *Owner of the Soil*; and is not debarred from exerciſing any *Act of Ownerſhip*.

The *Commoner* has no Right to meddle with the SOIL.

The *true Diſtinction* is taken in the Caſe of *Maſon* v. *Cæſar*, in 2 *Mod.* 66: Where the Court was of Opinion "that the Defendant, a Commoner, *might* abate the "*Hedges*; FOR thereby He did *not* meddle with the SOIL, "but *only* pulled down the *Erection*."

The

‡ The *Hedge* ſtopped the Commoner from entering, and ‡ P. 266.
putting in his Beaſts. The Grant gave Him Leave to enter, and put in his Beaſts. Therefore it *virtually authorized* Him to remove any Obſtruction *directly repugnant* to that Liberty.

But in the preſent Caſe, the Lord has done *nothing contrary* to the Grant: He has *not obſtructed* the Commoner from entering and putting in his Cattle.

The Lord has a *Right* to put *Conies* upon the Common: As appears from the Caſe of *Carrill* v. *Pack* and *Baker*, in 2 *Bulſtr.* 115, 116.

The Conies themſelves naturally make the *Burrows*. So that they are incident to the Right of putting on the Conies.

If the Lord ſurcharges, the Commoner is *injured* in his Right of Common, it is true: But what is the Commoner's *Remedy?* NOT to *abate*: *Not* to be his *own Judge*, in a complicated Queſtion, which may admit of Nicety to determine.

There is a certain *Line* to be drawn: The Lord has a Right *ſo far*, but *no farther*. Yet the Commoner cannot *deſtroy* or *drive off* the Conies: Nor, conſequently can he *deſtroy the* BURROWS; which is, in Effect, deſtroying the *Conies*.

This is founded upon Reaſon, and upon many Authorities.

Sir *Jerome Horſey*'s Caſe. [*V. ante*, 262.] 2 *Bulſtr.* 115, 116. The Caſe of *Carrill* v, *Pack* and *Baker* [*V. ante*, 262.]

And its being a *Free Warren* makes no difference.

So that the Queſtion is not. "Whether this be an *Injury*:" but "Whether it is ABATABLE."

I think it ſo clear a Caſe, that I have no Difficulty at all about it.

Mr. Juſt. *Deniſon* declared the ſame thing: And He ſaid He ſaw no Difference between this Caſe, and the Caſes cited: but *merely* in the *Expreſſion*, *viz.* that in this Caſe it is treated as a *Nuſance*; which is not the Expreſſion, in them. But this *Form of Expreſſion* makes no Difference.

Upon this Record, it muſt be taken, "that the Plaintiff "was *Owner of the Soil*, and *had a Free Warren*; and that there

* P. 267. " * there is *not ſufficient Common left*, (by the Increaſe of " the Contes) for the uſe of the Commoner."

The Queſtion then is, " Whether the Commoner ſhall be " intruſted to *deſtroy the* ESTATE of the Lord, in order to " preſerve his own *ſmall Right* of Common."

1 *Rol. Abr.* 405. *pl.* 2. gives the *Reaſon* why the Commo-
‡ Yet Roll ſays, " Du- " bitatur." ner cannot ‡ kill the Conies, but ought to bring his Aſſize or Action; *viz.* " becauſe he cannot be his *own Judge*."

So here, this Juſtification would make him a Judge in his own Cauſe. No: Let him take his *proper Remedy*.

This is plain Reaſon; even if it was *not* ſupported by Authorities: but the Caſes are alſo ſtrong, to prove it.

The only Point of this Caſe turns upon theſe Pleadings CALLING it a *Nuſance*.

But this will *not* MAKE it a Nuſance *abatable by the Defendant Himſelf*; nor can it alter the *Law*.

In Sir *Jerome Horſey*'s Caſe, *Cro. Jac.* 229. It was adjudged " that the Commoner has no other Intereſt than to " take the Common, by feeding his Cattle there: And *may* " *not deſtroy* the Conies nor Coney-burrows."

A Coney-burrow is *not*, of its *own Nature*, a Nuſance: On the contrary, it is eſſential to a free Warren.

Therefore the *Nuſance* depends upon the *Number* of them: And You can, at the utmoſt, only abate *ſo much* of the Thing as *is* a Nuſance. You cannot deſtroy the *Whole*, (which is the Right here claimed;) but only *ſo much* of the Thing as *makes* it a Nuſance.

In 1 *Strange*, 688. In the Caſe of *Rex* v. *Papineau*, Lord Ch. Juſt. *Raymond* expreſsly declares ſo. Suppoſe a Man builds his Houſe up ſo High, as to be a Nuſance to his Neighbour, by obſtructing his Lights or in any other Reſpect ariſing from its *Exceſs*: You can't deſtroy the *whole* Houſe; but only *ſo much* of it as by *its Exceſs* above what is allowable, conſtitutes the Nuſance.

Mr. Juſt. *Foſter* was of the ſame Opinion.

This Juſtification is clearly bad. It is founded on a Claim of Right which cannot be maintained.

It

† It is admitted "that a Commoner can not, in this Caſe, † P. 268.
"*deſtroy the Conies.*" Conſequently, He cannot deſtroy the *Burrows:* for the Effect is deſtroying the Conies.

If the Lord has exceeded the Bounds of his Right, the *Law* is to determine the *Quantum* of ſuch *Exceſs*; and to the Law the Commoner muſt reſort for his Remedy, if He is aggrieved.

Per Cur. unanimouſly

JUDGMENT for the PLAINTIFF.

See the next Caſe—The ſame Point.

Cope *v.* Marſhall.

H. 27 *G.* 2. *Rot'lo.* 145.

THIS being the ſame Point with the laſt preceding Caſe of *Cooper* v. *Marſhall*;

THE COURT without Argument at this Time, (but this very Caſe had been argued twice before, § though not be- § V. ante, fore Lord *Mansfield* and Mr. Juſt. *Wilmot*,) gave the like 259.
Judgment as laſt above, *viz.*

JUDGMENT for the PLAINTIFF.

Hope, ex dimiſſ. Brown et Ux. *v.* Taylor.

THIS came on, upon a Caſe ſtated, upon the Trial of an Ejectment.

The Caſe ſtated was this—

Robert Johnſon, ſeiſed in Fee *(inter alia)* of a *Copyhold* of Inheritance, and having firſt ſurrendered to the Uſe of his Will deviſed to *John Wedgeborough*, his Siſter's eldeſt Son, his Houſe in the Brook with the Out-buildings; and 30 *l.* to be paid within Twelve Months after his Deceaſe; To his Nephew *Robert Taylor*, 50 *l.* to be paid within Twelve Months after his Deceaſe; To his Nephews *Charles Taylor*, *Robert Taylor* and *William Taylor*, his Siſter's three Sons, 29 Acres of Arable and Meadow Land bought of *B*; not to be parted, but to part the Rent equally between them: then,

† P. 269. † then, to WILLIAM TAYLOR, his Siſter's Son, the Houſe in queſtion, by the Deſcription of " his Houſe on the Green ; " with the Ground and Out-houſes thereto belonging ;" And gives him alſo 10 *l* ; And to his *Brother-in-Law Charles Taylor* 5 *l :* And He directs the ſaid Legacies to be paid *within* 12 *Months* after his Deceaſe : And declares his Will and Meaning to be " That *if either* of the Perſons before " named *die without Iſſue* lawfully begotten, then the ſaid " LEGACY ſhall be divided equally between *them that are* " *left alive.*"

Note—It was ſtated that the Teſtator had *five* Houſes in all : And that the Will began with this Expreſſion, " As to ALL *my Worldly Eſtate &c.*" And it concludes thus, " And all the REST of my Houſes, " Goods, Land, and Cattle, I give to my Kinſ- " woman *Elizabeth Wedgeborough* ; and make Her my " ſole Executrix."

The Teſtator died ſeiſed of the ſaid five Houſes and Lands.

William Taylor entered, and was admitted, and enjoyed till the 13th of *June* 1755 ; when He died, leaving the Defendant *William Taylor*, his only Son and Heir at Law.

The Wife of *Brown*, the Leſſor of the Plaintiff, is Heir at Law to the Teſtator ; And, as ſuch, brought this Ejectment, againſt the Defendant *William Taylor* the Son, who claims as Tenant in Tail.

In this Caſe, there are made

TWO POINTS, which are [in Subſtance]

1ſt. What Eſtate *William Taylor*, the Deviſee, took by the Will ; *viz.* Whether an Eſtate *Tail*, or for *Life* only.

2dly. If only an Eſtate for Life, then Whether the Reſiduary Clauſe did not carry the *Reverſion in Fee*, to the *Reſiduary Deviſee :* (in which Caſe, the Heir at Law could have No Claim.)

Mr. *Clayton* for the Leſſor of the Plaintiff, the Heir at Law.

To the 1ſt Queſtion He argued that *William Taylor* the Defendant's Father, took only an Eſtate for *Life* ; not an Eſtate Tail.

The Deviſe is only to *William Taylor Himſelf* ; without any *farther* Limitation whatſoever.

The ſubſequent Words are, " that if either of *&c.* ſhall " die without Iſſue, then the ſaid LEGACIES to be divided " amongſt the Survivors."

Now

† Now the Word "LEGACIES" will be ſatisfied by the *Money*-Legacies: And there were *Four* Money-Legacies before given, Therefore this Clauſe ſhall not be extended to the Deviſe of *real* Eſtate. For an Heir at Law ſhall *not* be diſinherited, by *doubtful* Words, or by *Implication.* †Page 270.

2d Queſtion, Upon the *Reſiduary* Clauſe—

The Reſiduary Clauſe does *not* carry the *Reverſion in Fee* in theſe Premiſſes in Queſtion, to *Elizabeth Wedgeborough.*

There were OTHER *Lands* beſides theſe, for the Words to operate upon: And theſe Words here are, "all the *Reſt* of "my Houſes, Lands, *&c.*"

3 *Peere Wms.* 56. The Caſe of *Cheſter* v. *Cheſter* was a Caſe, (and many other Caſes might be mentioned,) where there were *no other* Lands for the Words to operate upon.

But here He had FIVE Houſes; And *only* 3 were deviſed: So that "*Reſt*" means his *other* Houſes."

But (What goes to both Points—)

This was *Copyhold:* And he had likewiſe *Freehold* Lands, diſtinct from the Copyhold; And therefore the Copyhold not being *particularly* named, the Words of the Deviſe ſhall only extend to the *Freehold.* Which is fully proved by two Reſolutions in *Caſes in Equity abridged, pa.* 124. *pl.* 13. *& pl.* 14.

Mr. *Nares pro Defend*t.

He made the ſame two Points, with Mr. *Clayton.*

1ſt. The Teſtator had no Child, but ſeveral Nephews; *viz. J. W.* his Siſter's Son by a former Huſband, and 3 Nephews *Taylors*, her Sons by a latter Huſband: And He gives Houſes and Legacies amongſt them, in different Proportions.

The Word "LEGACY" relates, and the Teſtator intended it to relate, to the Houſes, *as well as* to the Money-Legacies. He could never intend to give ſuch a Trifle as the *Intereſt* of 5l. to his Brother-in-Law, for his Life only. And it may be obſerved, that if this *Charles Taylor*, the Teſtator's Brother-in-Law, (one of the Legatees above named) ſhall happen to die *without Iſſue*, the other 3 Legatees; (his 3 *Sons*) muſt conſequently be dead too: And then there would be *nobody* left alive, to divide it amongſt.

‡ P. 271. ‡ And if the Word "LEGACY" relates to the *real* Eſtate, it is a clear Eſtate Tail in *William Taylor*. (Which Poſition Mr. *Clayton* agreed to.)

2d Queſtion—The Will begins, "As to *all* my worldly "Eſtate." Therefore He meant to paſs *every* Thing by this his Will.

The Caſes of *Ibetſon* v. *Beckwith*, [*Forreſter* 157.] *M.* 1735, *in Canc.* and of *Tanner* v. *Wiſe*, in 3 *Peere Wms.* 295. both of them prove this.

1 *Lev.* 212. The Caſe of *Cooke* v. *Gerrard* is expreſly in Point—"That the Word *Land*" in a Deviſe meant not only the Thing itſelf; but the "*Intereſt* of the Thing."

As to *Caſes in Equity abridged* 124, there was no Surrender of the Copyhold Eſtate: But it is here ſtated "That the "Teſtator had *ſurrendered* the Copyhold Eſtate, to the Uſe "of his Will." Which renders his Intention clear, to *diſpoſe* of it.

However, this Reaſoning only reaches the 2d Queſtion: For the *firſt* Deviſe is *expreſs*.

And the Defendant is Son and Heir to *William Taylor*.

Therefore He prayed Judgment of Nonſuit againſt the Plaintiff.

Mr. *Clayton* in Reply.

All the Money-Legacies are to be paid within a *Year*. Therefore the Event muſt happen *within* that Year; Or elſe the eventual Deviſe could not take Effect.

The Word "*Reſt*" clearly *excludes* what He had *before* deviſed.

LORD MANSFIELD—Mr. *Clayton* admits that *if* the Word "LEGACY" *is applicable to Lands*, *W. T.* has an Eſtate Tail.

This is plainly a Will of the Man's *own* drawing.

He profeſſes to diſpoſe of his *whole* Eſtate. He means to make *One* of his Relations his General Heir: The *other* Objects of his Bounty are 4 Nephews. And He gives them Land; And alſo gives ſome pecuniary Legacies, to be paid *within* 12 *Months* after his Death: (Which indeed the *Law* would have implied.)

‡ Then He gave his Brother-in-Law 5l. ‡P. 272.

And if either of theſe Perſons before named ſhall *die without Iſſue* lawfully begotten, then he gives the "ſaid LEGACY" to thoſe that ſhall be left alive, to be equally divided between them.

The Explanation of this Word "LEGACY" muſt be governed by the *Intention* of the Teſtator: And to this Purpoſe, ſome Streſs may be laid upon this Introduction of the profeſſed Diſpoſition of *All* his worldly Eſtate. A *different* Conſtruction has been ſometimes put upon the very *ſame* Words, as applied to Money and Lands; in order to *ſupport the Intent* of the Teſtator: As in the Caſe of *Forth* v. *Chapman*, by Lord *Macclesfield*.

It is *moſt agreeable to the Intention* of the Teſtator in this Caſe, to conſtrue this Word "Legacy" to extend to *Land*.

It would *not* be a *legal* Limitation, if confined to Money.

The Legacies may happen to be *ſpent*, ſoon after the Twelvemonth is expired.

And it could never be intended that ſo *ſmall* a Sum as the 5l. ſhould be put out to Intereſt, and keep liable to this Limitation.

If the Brother-in-Law died *without* Iſſue, there would be *No One left* to divide the Legacies.

Common People do not make ſuch Diſtinction between Money and Land, as Perſons converſant in Law Matters do.

The Teſtator meant this Clauſe as a Reſtraint upon his former Bequeſt; and meant that the Iſſue ſhould have it.

The Word "Legacies" *does* extend to Lands, as well as to Monies. Common Perſons would not think of uſing the Word "*Deviſe*:" (Which is the more uſual *legal technical* Term.)

Therefore upon the 1ſt Queſtion I think it is an Eſtate *Tail*.

But his Lordſhip did not chooſe (it not being at all neceſſary) to declare any Opinion upon the 2d Queſtion: becauſe a third Perſon not now before the Court, might be affected by it.

Mr. Juſt. *Deniſon* concurred—He thought the Word "LEGACIES" extended to *real* Eſtate; And conſequently that it was an Eſtate *Tail*.

‡ P. 273. ‡ Mr. Juſt. *Foſter* alſo held that the Teſtator *intended* the Land to go over; and that it was an Eſtate *Tail.*

If the Word "LEGACY" was confined to *pecuniary* Legacies, the Deviſe over could not have taken Effect; being *after* a dying without Iſſue; [*V. Ante, P.* 272. Lord *Mansfield* accordingly.]

Beſides, *Charles Taylor* who was One of the Perſons before named, has *no pecuniary* Legacy given *him*, ſo that it *muſt* mean Land; as to HIM.

And theſe are *ſmall* Legacies, (one of them only of 5l.) And payable within a *Twelvemonth.* Therefore the Teſtator cannot be ſuppoſed to apply this Limitation to *them*; but to the LAND which He had deviſed by his Will.

Per Cur. unanimouſly
JUDGMENT for the DEFENDANT.
(*viz.* of NONSUIT of the PLAINTIFF.)

Saturday, 30th April, 1757.

Denn *verſ.* Lord Cadogan et al'.

THIS Day having been appointed for a Trial at Bar, in this Cauſe, ONLY 9 *of the Jury appeared.*

Sir *Richard Lloyd pro Quer'* prayed a *Decem Tales.*

By the Courſe of the Court, this Trial could not have come on again, *till Michaelmas* Term: (the immediately next Term being an *Iſſueable* Term, wherein there are *no Trials at Bar.*)

But the Court obſerving the great Expence and Delay which would by this Method of Proceeding be occaſioned to the Parties, aſked "Whether there were Gentlemen of the "County enow in town, to make a Complete Jury,"

And being told "that there *were*;" And the Gentlemen of the Jury who now attended, expreſſing a Deſire "not to "be kept in Town,"

The COURT ordered the Return of the *Decem Tales* to be on the *Monday following*; (though there had never been before an Inſtance of it.)

And

‡ And by ſo doing, they ſaved vaſt Expence, as well as ſome Delay to the Parties concerned. ‡ Page 274

For now, on *Monday* 2d *May* 1757, a full Jury appeared: And the Trial proceeded.

The Cauſe itſelf had no Difficulty in it; And was ſoon over.

For the Leſſors of the Plaintiff claimed as Heirs at Law of *George Smith*, Eſq; who died in 1607: And they drew down their Deſcent through two Siſters, who had married *Carlos* and *Underwood*. One of their other Anceſtors, as they pretended, was *Francis Smith*, third Brother of the firſt Lord *Carrington*, *(Charles Smith*, alias *Carrington:)* But they could not by any Means make this out.

Their Claim was as Heirs at Law, under a Family Settlement of the Lord *Carrington*, in 1687. But they could not ſhew the leaſt Probability that *Francis* the third Brother of the Lord *Carrington* (whoſe Eſtate was prior to the Plaintiff's Claim) was *dead without Iſſue*.

Whereupon the PLAINTIFF was NONSUITED.

The COURT, on the Application of the Gentlemen of the Jury, *took off the Fines* (of 20*l.* a-piece) which had been ſet, on *Saturday* laſt, upon the Defaulters.

Hawkins *verſ.* Colclough. Tueſday 3d May 1757.

Trin. 29, 30 *G.* 2. *Rot' lo* 962.

(*Lord Commiſſioner* Wilmot *abſent, in Chancery.*)

IN an Action of Treſpaſs for an Aſſault Battery and falſe Impriſonment an AWARD (made pending the Action) being pleaded to this Action, and a *Tender* of the Sum awarded: The Plaintiff demurred.

The Award (which was made upon a Submiſſion of all Diſputes, *&c.)* was in theſe Words—" Whereas there has " been a Suit at Law between the Parties, that hath run to a " great Expence on both Sides; And it being left to me to " make an End of it; I determine That they ſhall each " of them pay their own Charges at Law; And that " the Defendant pay the Plaintiff five Shillings, for his making " the firſt Breach in the Law."

Mr.

‡ P. 275. ‡ Mr. *Anguiſh pro Quer'* objected to the *Award*, as being

1ſt. *Uncertain*;

2dly. *Not final.*

Firſt—It is *uncertain.* The Submiſſion is of *ſeveral* Matters: And the Award does not at all ſhew, *which* of them it means to determine. 1 *Ro. Abr.* 242. Letter B. *pl.* 1. 252. *pl.* 10.

And an Averment without a Fact to ſupport it is of no Avail. 1 *Ld. Raym.* 246. in the Caſe of *Bacon* v. *Dubarry*, the 4th Reſolution is expreſly ſo.

This is an Action of Treſpaſs. The Submiſſion is of *all* Treſpaſſes: And the Award does not diſtinguiſh *what* Treſpaſſes it determines. 1 *Ro. Abr.* 251. Letter I. *pl.* 1. and *pl.* 3. and the Caſe of *Maw* v. *Samuel* in *Popham* 134. and 2 *Ro. Rep.* 1. the Caſe of *Bacon* v. *Dubarry* (before cited.) The 3d Reſolution ſays "That the Award was void for the Uncer-"tainty, without Releaſes."

Now *here* are *no* Releaſes. Each is to pay their own Charges. And the Defendant is awarded to pay to the Plaintiff 5s. for his [the Defendant's] having been guilty of the firſt Breach of the Law.

The Injury complained of was Aſſault Battery and falſe Impriſonment. And here is no Satisfaction awarded for the Injury. 1 *Ld. Raym.* 247. The Caſe of *Freeman* v. *Bernard.*

Second Point—'Tis *not final:* Which it ought to be.

An Award muſt be *final.* But this Award was made pending the Action: And it does not put an End to it, at all.

Under this Head, He cited 1 *Ro. Abr.* 252. *pl.* 16, 17. [But One of theſe is marked by the Abridger, "*Dubitatur*: "The other, "*Contra.* 15 *H.* 7. 22."] Alſo 2 *Strange* 1024. The Caſe of *Tipping* v. *Smith:* Where the Award was held ill; being uncertain, and not final. And *Cro. Eliz.* 904. The Caſe of *Colſton* v. *Harris:* Where the Award was holden void; becauſe Nothing was awarded to the Defendant, nor to be free from Suits: So no Advantage to Him.

Mr. *Caldecot contra pro Def'.*

This Award is pleaded by Conſent of the Plaintiff, and by Leave of the Court. And though pleaded as being made pending

‡ pending the Action, *viz.* between the Action brought and † P. 276.
the Plea pleaded; yet the Court will determine upon the mere Validity of it.

1ſt. It does appear upon what particular Suit, the Award was.

The Generality of the Submiſſion is not inconſiſtent with the Particularity of the Award. 8 *Rep.* 98. *b. Baſpole's* Caſe. [2d Reſolution.]

This ſhall be taken to be the *whole* Matter depending between the Parties: And *no other* Suit than this appears to have been depending, between the Parties.

The Caſe of *Bacon* v. *Dubarry*, in 1 *Ld. Raym.* 246. is not like or ſimilar to the preſent Caſe.

After Payment made or tendered, the Action of Treſpaſs is *diſcharged.*

Hob. 49. The Caſe of *Nicholls* v. *Grumnion* is expreſly ſo. [The Words are—" For a *Satisfaction* implies a Diſcharge."]

The preſent Award (which was made by a *Cobler*) recites that there was ſuch a Suit; And that it being left to Him to make an End of the ſaid Suit, He determined as follow, *viz.* " That the ſaid *J. H.* and *J. C.* ſhould each of them *pay* " *their own Coſts and Charges at Law*; And that the ſaid *J.* " *C.* ſhould *pay the ſaid J. S. 5 Shillings for his making the* " *firſt Breach in the Law.*"

And this may be pleaded in Bar, in another Action.

The Arbitrator certainly *intended* to make an End of this Suit depending between the Parties; and thought 5*s. adequate to the Injury.*

Mr. *Anguiſh.* in Reply—Notwithſtanding the Conſent to " plead this Award in Bar," Yet all Objections to the Award itſelf are ſtill open.

This is *not ſhewn* to be the *only* Matter between them: And *non conſtat* that the Award was made concerning this *particular* Action.

I agree that *Payment* diſcharges the Treſpaſs. But then it ought to appear that the Payment was in Satisfaction of the SAME *Treſpaſs.* Which does not appear in this Caſe.

LORD

‡ Page 277. ‡ LORD MANSFIELD—

The Question is Whether this be a *good Award*.

Awards are now considered with *greater Latitude* and *less Strictness*, than they were *formerly*. And 'tis right that they should be *liberally* construed; because they are made by Judges of the Parties *own Chooſing*. And this is often, (as it is here,) in Cases of *small* Consequence, where the Play is not worth the Candle.

Indeed they must have these two Properties, to be *certain*, and *final*.

But the Certainty may be judged of according to a *common* Intent, and consistent with fair and *probable Presumption*.

This Submission is, in *general* Terms, " of *All* Actions, " Controversies and Suits between them." The Arbitrator recites ONE; referring to the Submission, as authorizing him to determine it: And it appears that *this* Suit *was depending* between the Parties. And the Parties have *not desired to be heard* upon any more *than this One*. Therefore there is no *probable Presumption* of any *Other*.

2dly. As to its being *final*—It seems to be a reasonable and fair Award.

The Arbitrator, plainly, thought it a MERE TRIFLE; and seems to have thought *both* Parties to have been in the wrong; and therefore awarded each to stand by his own Costs.

And the 5*s*. awarded to be paid, is plainly *in Satisfaction* of this *same* Action; and therefore is a *Discharge* of it, being paid or tendered.

☞ And he declared against *critical Niceties*, in scanning *Awards* made by Judges of the Parties *own Chusing*, in order to the Determination of Disputes between them.

Therefore He was clear that the Judgment ought to be for the Defendant.

Mr. Just. DENISON concurred—

The Submission is *General:* The Arbitration is alledged to be " de et super *Præmissis*;" And it *does not appear* that *any Thing else* was before the Arbitrator. It's plain that *this* Matter was *submitted:* And We have *no* reason to *presume* " that there was any *other*."

And

† And it *is ſufficiently final:* It is to pay 5*s.* FOR having † Page 278.
been guilty of the firſt Breach of the Law. Therefore it is the *ſame* as if it had ſaid " *in Satisfaction.*" Therefore it is mutual and final.

And *Awards* ought to be conſtrued *liberally* and *favourably.*

Mr. Juſt. FOSTER concurred, for the Reaſons already given.

JUDGMENT for the DEFENDANT.

Perry *v.* Nicholſon.

AFTER an unſucceſsful Motion, made on the Part of the Defendant, " to ſet aſide an Award;" and an equally unſucceſsful One, made on the Part of the Plaintiff, " to en-" force it by an Attachment for Non-performance;" The Plaintiff found Himſelf obliged to have Recourſe to his *Action* againſt the Defendant upon it.

And now, upon an Action of Debt brought by Him on this Award, reciting that in an Action of *Aſſumpſit*, the Parties, at the Trial, had ſubmitted *the* Matters in Difference *in the* SAID CAUSE, to certain Arbitrators, *&c*, ſo as they ſhould publiſh their Award IN WRITING concerning the Premiſſes, before, *&c*; And that they accordingly did publiſh their Award IN WRITING, *&c*, and awarded " that the " Defendant *Nicholſon* ſhould pay to the Plaintiff *Perry*, 48*l.* " 11*s.* 10*d.* in full Payment Diſcharge and Satisfaction of all " Money whatſoever or any Ways due or owing unto *Perry* " by *Nicholſon*, at the Time of commencing the ſaid Action; " and that ALL Actions depending between them for *any* " *Matter*, Cauſe or Thing *whatſoever* ariſing before or at the " Time of referring ſhould *from thenceforth ceaſe*; and that " upon Payment of that Sum, they ſhould within two Days " after the *Taxation* of Coſts in the Action and Payment " thereof to *Perry*, ſeal and execute to each other, GENERAL " Releaſes of all Matters in Difference in the ſaid Cauſe."

Then the Plaintiff avers that there was, at the Commencement of the Action, or at the Time of Reference, *no other Money* whatſoever, any Ways due to Him the ſaid Plaintiff *Perry* from *Nicholſon*, but the Matter in Difference in the ſaid Cauſe; And that *No other Action* was depending between them; And that the Coſts were *taxed* at 28*l.*

The Defendant pleads " that no ſuch Award was made." Replication—" that there was ſuch an Award, *&c.*" And Iſſue joined thereupon.

The

§ P. 279. § The Plaintiff gave in Evidence, an Award in Writing, *indented*, under the Hands and Seals of the ſaid Arbitrators named in his Declaration and Replication, with the following *Variations* from and Additions to the Award ſet forth in the Declaration—*viz.* There was in the Declaration,

1ſt. An *Omiſſion* (after the Award "to pay &c.") of theſe following Words—"That *Nicholſon* at the ſame Time *deliver* "*up to* Perry *a Promiſſory Note* of *Perry*'s payable to *Nicholſon* "or Order for 5*l.* 7*s.* *to be cancelled.*"

2d. A *Miſrepreſentation* of the Releaſe: Which is, "that "they ſhould execute MUTUAL *and general* Releaſes of all "Actions, &c, Debts, &c, for any Matter Cauſe or Thing "whatſoever from the beginning of the World *unto the Day* "*of the Date* hereof.

3dly. The Award produced in Evidence, is by Deed, *indented, under Hand and Seal:* Whereas the Award declared upon is only an Award "*in Writing*," merely.

Upon this Evidence, there was a Verdict for the Plaintiff, ſubject to the Opinion of the Court, on this Queſtion, —"Whether there be MATERIAL *Variances* between the "Award declared upon, and the Award given in Evidence."

Mr. Serjeant HEWITT—*pro Quer.*

This Action is an Action of Debt ON *the* AWARD itſelf; Not an Action of Debt *on* the Arbitration BOND: And on *ſuch* an Action, no more needs be ſet out, than is material, and enought to *intitle the Plaintiff* to his Demand. 1 *Leon.* 72. the Caſe of *Smith* v. *Kirfoot.* 1 *Salk.* 72. the Caſe of *Foreland* v. *Marygold.* Both which Caſes are expreſly ſo.

Another Rule concerning Awards is, that the *Generality of the Words* of them may be *reſtrained*, ſo as to be conſtrued to amount to no more than they ought to amount to. One Way of doing this, is by *Averment* connecting the Award with the Submiſſion: As it is ſaid in the Caſe in *Aleyn* 51, 52. *Roſe* v. *Spark* [firſt Point] "That the Words *de Præmiſſis* "have been newly uſed in pleading Awards; in order pro"perly to apply the General Words proportionable to the "Things ſubmitted."

Another Way of doing this, is by pleading them according to their *legal Operation.*

Another Way of reſtraining the Generality of Words is by *Intendment of Law:* As was done in 1 *Salk.* 74. *Simon* v. *Gavil.*

Another

* Another Way is by *pleading the Matter*; (which is the proper Way for the Defendant to take Advantage of it:) As in *Moore* 885. No. 1242. The Caſe of *Lea* v. *Paine*. * P. 280.

Another Way is, that an Award may be *good in Part*, and *bad in Part*; if relative to diſtinct Things.

To apply theſe Poſitions—Here are four Things awarded: Which it is true, are not all particularly ſet forth.

But ALL *that is* NECESSARY *to* THIS *Suit, is* ſet forth; The *Other* Things are not relative *to it*. And here is an *Averment* "That *no* other Thing was in Diſpute."

The Queſtion is, "Whether this Award produced in Evi-"dence proves the Declaration."

Now *All* that is *material* in the Declaration, upon *this* Action of Debt upon the Award, is the Award of the 48*l.* and the 28*l.* Coſts. So that it is ſufficient to prove the Declaration.

Mr. ANGUISH *contra pro Def*.

1ſt. Here is an *Omiſſion* of that Part which obliges the Defendant *Nicholſon* to deliver up a Note: Which Note compoſes Part of the Sum, and was in Conſideration to make up the 48*l.*

To ſuppoſe it otherwiſe, is inconſiſtent: Becauſe, otherwiſe, they would not have ordered it to be given up.

He cited 2 *Lev.* 235. The Caſe of *Adams* v. *Statham* Where an Omiſſion vitiated the Award.

LORD MANSFIELD—after ſtating the Caſe, ſaid that nothing was clearer, than that in an Action of Debt UPON *an* AWARD, a Man has *no* Need to *ſtate in his Declaration any more* of the Award, than ſupports his Caſe.

If there be any Thing by way of *Condition precedent* to the Payment of the Money, the *Defendant* may *ſet it out* in pleading.

This has been the Law, ſo long ago as from the Time of the Regiſter: Where there is a Writ which ſets forth only ſo much as is neceſſary. [*V. Regiſter* 111.]

The

‡ Page 281. ‡ Then with Regard to the *Releaſe*—The Court will *intend* that the *Releaſe* ſhall *extend* ONLY *to the Matter under the Submiſſion.* Beſides here they have averred " That there " was *no other* Matter in Variance."

Therefore I think there is NO *material Variance* between the Declaration and the Evidence.

Mr. Juſt. DENISON—was as clearly of the ſame Opinion: Which he declared to the following Effect.

The Queſtion is " Whether the Award given in Evidence " is ſufficient to ſupport the Award ſet forth in the Decla- " ration."

Now Nothing is claimed by *this* Action, *but* the *Money.*

And the Queſtion is " Whether it was neceſſary, in *this* Action, to ſet forth any Thing MORE *than* ſupported his Claim to recover, and *ſhewed his Right to this Money.*

It has been ſettled that in Actions *upon* AWARDS (which are no Specialties) there is *no* Occaſion to ſet forth the *whole* Award: The Plaintiff *needs not* ſhew any thing *more than* what is neceſſary to ſupport that *particular* Claim; and to intitle him to the *Thing*; And if the *Defendant* will *impeach* the Award for any Thing, that is to come on HIS Part.

1 *Leon.* 72. *Smith* and *Kirfoot's* Caſe, is expreſsly ſo reſolved.

Littleton's Rep. 312, 313. *Leake* v. *Butler*, is a like Reſolution: Where the Form of declaring is ſaid to be taken from a Writ in the *Regiſter* 111.

And *this Diſtinction* between Debt upon the *Award* itſelf, and Debt upon the Arbitration-*Bond*, was admitted in

1 *Salk.* 72. the Caſe of *Foreland* v. *Marygold:* Which was an Action of Debt upon *Bond* to perform an Award. And 1 Lord *Raym.* 715. *Foreland* v. *Hornigold* is the ſame Caſe: Where alſo it appears to have been an Action of Debt upon the *Bond.*

Here, the Award is " That *Nicholſon* ſhall pay the Money, " and deliver up the Note." And this is an Action of Debt brought by *Perry*, UPON *this* AWARD, for the *Money.* It would, as I have already ſaid, have been a quite different Caſe, if it had been an Action, *upon the Arbitration*-BOND.

But

‡ But it is here good, even though on the mere Face ‡ P. 281.
of the Declaration it ſhould appear *as a bad* Award, by appearing thereupon and as there ſet forth, as if it were only an Award on one Side. For the Plaintiff, in *this* Action upon the Award itſelf, needed only to ſhew *ſuch* Part as he grounds his Action upon.

Then as to the *Releaſes*—The Award " of *General* Releaſes," was *void, as to* OTHER Matters not ſubmitted. Here, nothing is ſubmitted, but in *this* particular Action. And in an Action upon the Bond, " a Releaſe as to *all* " *Matters under Submiſſion*," would be a good Plea; though the Award be an Award of " *General* Releaſes."

But here it is *expreſsly averred*, " that there *were* NO " OTHER Matters in Diſpute." However, there was no Occaſion for that Averment; becauſe We would NOT *have intended* " that there were any other."

Mr. Juſt. FOSTER was of the ſame Opinion.

He ſaid it was ſufficient in an Action of Debt *upon* the AWARD ITSELF, to ſet forth *ſo much* only as is neceſſary to ſupport the Plaintiff's Claim: The *other* Part of the Award may, perhaps, *be performed*.

He thought therefore, that the Evidence well proved the Declaration.

Per Cur. unanimouſly (Mr. Juſt. *Wilmot* abſent)
Let the POSTEA be delivered to the PLAINTIFF.

Wright, ex dimiſſ. Plowden Arm. *v.* Cartwright.

ON a Caſe ſtated, from the Aſſizes.

Edmund Plowden being ſeiſed in Fee, demiſed on the 5th of *October* 1676, by Deed, (*viz.* by Indenture of Leaſe between Him and *Elizabeth Cartwright*, ONLY,) to the ſaid *Eliz. Cartwright* for 99 Years, if ſhe ſhould ſo long live; and after her Death, if ſhe happen to die within the ſaid TERM, or other End or Determination of the ſaid TERM, the Remainder *thereof* to *Rowland Cartwright* her Eldeſt Son, (then under Age,) *for and during the Reſidue* of the ſaid TERM, from thence enſuing and fully to be complete and ended: Yielding and paying, *&c*, and doing Suit at a Mill, *&c*; with a Penalty for every Time that She *or Rowland* ſhall grind at another Mill; and *paying a Heriot* on the Death of *Either*. And it is covenanted that

BOTH

1 P. 283. BOTH of them ſhall repair &c. And the Leſſor on his Part covenants that BOTH ſhall quietly enjoy &c.

Eliz. Cartwright entered and was poſſeſſed; and died on the 4th of *September* 1694. Whereupon *Rowland Cartwright* entered, and was poſſeſſed, till the ſaid *Rowland* died; which happened on 5th *November* 1753.

The Leſſor of the Plaintiff is Heir at Law to *Edmund Plowden*, the Leſſor. The Defendant is the perſonal Repreſentative of *Rowland Cartwright*.

The Queſtion is "Whether the TERM *exiſts*:" i. e. Whether it *continues* BEYOND *the Life of Eliz. Cartwright*. For *if* the TERM does *not* continue beyond the Life of *E. C.* then the Leſſor of the Plaintiff has a Title to recover: *If* it *does*, then the Defendant hath a Title, as Repreſentative of *Rowland Cartwright*.

Mr. *Aſton pro Quer'*.

Argued that the Term was *expired*: It expired on the *Death of Elizabeth*; the Limitation over, being void. And He cited *Tr.* 8 *Eliz. Dyer* 253. *b. pl.* 102. which is exactly the ſame Limitation: *viz.* "to *W. Cecil pro* Termino 21 "*Annorum, ſi tam diu vixerit; et ſi obierit infra prædic-* "*tum* Terminum, *tunc &c.* The Remainders were holden "void; becauſe the *Term* is determinable upon the Life "of *W. C.*" And He alſo cited *Cro. Eliz.* 216. *Tr.* 32 *Eliz.* The Caſe of *Green* v. *Edwards*. That was exactly this Caſe. It was a Leaſe to *J. S.* for 90 Years, if he live ſo long; and if he die within the *Term*, that then his Wife ſhall have it, *durante toto reſid' Termini prædict'*: It was held void to his Wife; and that She took Nothing. And He ſaid that 1 *Co. Rep.* 153. *b.* Rector of *Chedington*'s Caſe, is expreſs and full to the ſame Effect; and was agreed *per tot' Cur'*. And that *Co. Litt.* 45. *b.* is expreſs that "*Term*" ſignifies the *Eſtate* and *Intereſt* that paſſes; and *differs* from a Specification of the Number of Years: And ſays, "So note the Diverſity."

All which Caſes, He inſiſted, prove this Limitation to be *void*.

He cited *Sheppard*'s *Touchſtone of Common Aſſurances* 274. Where it is ſaid, that if a Man makes a Leaſe to *A.* for 80 Years if he ſo long live; And if he die within the ſaid Term, or alien, that then his Eſtate ſhall ceaſe; and by the ſame Deed the Leſſor farther lets to *B.* for ſo many Years as ſhall then remain unexpired after &c, for the Reſidue of the ſaid *Term* of 80 Years, if he ſhall ſo long live; in this Caſe the Leaſe to *B.* "during the Reſidue "of

" † of the TERM," is void: For after the Death of *A*, the † P. 284.
TERM is at an *End*. But if He ſay, " for and during the
" Reſidue of the 80 YEARS," it is good.

Mr. *Nares contra pro Def.*' was beginning to ſpeak—

But LORD MANSFIELD ſtopped Him; (as not being neceſſary:) And He Himſelf proceeded thus—

LORD MANSFIELD—The Diſtinction juſt cited from *Sheppard*, (which He takes from the Rector of *Chedington*'s Caſe,) makes no Difference; *if* the Word " TERM" may ſignify the *Time*, as well as the Intereſt: For *then* it becomes merely a Queſtion of Conſtruction, " *Which* Senſe the Word " ought to be *underſtood* in."

So *Anderſon* argued, in *Green* v. *Edwards*: He ſaid, " If the Wife had been a Party to the Deed, *Durante ter-*
" *mino* ſhould *not* be taken for the *Intereſt*, but for the
" *Time*." He ſaid, " The Word *Term* cannot be taken to
" mean the *Intereſt* which the Huſband had for 90 Years."
(For if it is *ſo* underſtood, By *his Death* the whole would be determined; And the Wife could have Nothing: And therefore it could not be uſed in this Senſe. But the Leſſor, by the Word " *Term*," muſt mean the *Time* of 90 Years: And the Word, " *Term*" ſignifies *as well the Time or Space* of 90 Years, as the *Intereſt*.) The other Judges held the *Limitation by way of Remainder* to be *void*, from the *Uncertainty of Commencement*: And denied that the Wife's being a Party would have made any alteration.

The *Old* Caſes held " that there could be *no Remainder*
" or Subſtitution *of a* TERM *after an Eſtate for Life*, by *Deed*
" or *Will*." It was a mere *Poſſibility*. It was *void*, from the *Uncertainty of Commencement*. There was *no particular Eſtate*. The Gift of a Term (like any other Chattel) for an *Hour*, was good *for ever*.

The Objections were ſubtile and artificial.

When *long and beneficial Terms* came in Uſe, the *Convenience of Families* required that they might be ſettled upon a Child, *after the Death* of a Parent. Such Limitations were ſoon allowed to be created by *Will*: And the Old Objections were removed, by changing the Name, from Remainders, to EXECUTORY *Deviſes*.

The *ſame Reaſon* required that ſuch Limitations might be created by *Deed*: As, for Inſtance, Marriage-Settlements, to anſwer the Agreement of Parties, and Exigencies of Families. Therefore, to get out of the literal Authority of Old

Caſes,

* P. 285. * Caſes, an ingenious Diſtinction was invented: A Remainder might be limited for the Reſidue of the *Years*; but *not* for the Reſidue of the *Term*.

Now in *this* Caſe, upon the true Conſtruction of the Leaſe, I am clearly of Opinion, "That the Land is demiſed to the "Son *for ſo many of* 99 *Years* as ſhould be unexpired at the "Death of his Mother."

There are many Maxims of Law, That Deeds, eſpecially ſuch "as execute mutual Agreements for valuable Conſider-"ation, ſhould be conſtrued *liberally*, *ut Res magis valeat*, "according to the *Intent*:" which ought always to prevail, unleſs it be contrary to Law.

The Paſſage from *Coke Littleton* 45. cited by Mr. *Aſton*, defines the Word "*Term*" to ſignify, in Underſtanding of Law, "*not only the Limits and Limitation of Time*, but alſo "the Eſtate and Intereſt which paſſes for that Time."

If in *this* Leaſe, the Word be taken in the *latter* Senſe, The Widow can only have it for ſo many of 99 Years as *She* ſhould live; And the Son have NOTHING afterwards.

But it is manifeſt that an Intereſt was underſtood to *continue after her Death*, to be *enjoyed by her Son*.

From the Courſe of Nature, it could not be ſuppoſed that She would *outlive* the 99 Years. *Rowland* is to *pay a Penalty* for grinding at another Mill. *He* is to *pay a Heriot* on the Death of his Mother. *He* is to *repair*. The Leſſor covenants "that *Rowland ſhall quietly enjoy*:" i. e. for ſo many Years as ſhould not be run, at the Death of his Mother.

The *firſt* Senſe of the Word makes every Thing conſiſtent and effectual: The *ſecond* Senſe deſtroys One Half of the Leaſe, as repugnant and contradictory to the Other. There ought to be no Doubt, therefore, in *Which* Senſe the Word ſhould be underſtood.

Mr. *Aſton* has laid no Streſs upon the only Objection which weighed with *Anderſon*, ſo long ago as the 33d of *Elizabeth*: *viz.* "That *Rowland* was *no Party* to the Leaſe:" And rightly. The Reaſon *why* He was no Party, appears from the Leaſe: He was then an *Infant*. The Mother contracts, and procures this Limitation *for Him*. A Grant may be made to a Perſon, by a Deed to which He is no Party. *Rowland accepted*, and actually *enjoyed*, after his Mother's Death, from the 4th of *September* 1694, to his own Death, the 5th of *November* 1753. The Leaſe was ſo intelligible to every *unlearned* Eye, that no Body doubted of his Title, for 60 Years.

Limita-

§ *Limitations of Terms* are *now* of general Uſe. Their Bounds are ſettled. The Rules concerning them are certain and eſtabliſhed. When they came to be allowed by Will, or by Declaration of Truſt, the *ſubſtantial Reaſon* was the ſame for allowing them by *Deed*. A ſtrained Conſtruction ſhould not be made, to overturn the *lawful Intent* of the Parties. It was *lawful*, to ſecure the Leaſe for the Benefit of the Mother during her Life, and afterwards by way of Proviſion for her Son. *All* the Parties undoubtedly *intended* it. The Covenant here, " that *Rowland* ſhould enjoy from the " Death of his Mother, for the Reſidue of 99 Years," is ſufficiently certain; and might, of itſelf amount to a Leaſe. § P. 286.

Mr. Juſtice DENISON—This muſt be taken that She ſhould hold it for ſo much of the Term of *Years* as ſhe ſhould live; and *Rowland*, during the Remainder.

The *Intention* of the Deed is obvious: And it certainly ſhews, (upon the whole Tenor of it,) that the *Intention* of the Parties was " that BOTH ſhould enjoy during the whole " Term and Number of Years." And if We *can* ſupport the *Intention*, by *any* Conſtruction, We will do it.

Mr. Juſt. FOSTER was clear that the INTENTION was that *Both* ſhould enjoy during the whole *Term and Number of Years: Viz. Elizabeth* for ſo long of it, as ſhe ſhould live; and *Rowland*, during the Remainder. All the Circumſtances ſhew this: And the reſerving a *Heriot* upon the Death of *Rowland* proves the *Intention* to have been " That the " *Term* ſhould *continue to Rowland, after* the Death of his " Mother." And the Covenants all along run, " That *Row-* " *land* ſhall quietly enjoy."

Therefore He concurred.

Per Cur. unanimouſly (Mr. Juſt. *Wilmot* abſent,)
RULE—That the PLAINTIFF be NONSUITED.

† P. 287. Wedneſday, 4th May 1757.

† Lant Eſq; *verſ.* Norris.

P. 29 *G.* 2. *Rot'lo* 609.

The COURT *full.*

THIS was an Action of Covenant, by *Robert Lant* Eſq; Son and Heir of *Thomas Lant* Eſq; againſt *William Norris* Adminiſtrator of *John Norris* Eſq; his late Father; which *John Norris* was Aſſignee of *Thomas Wilſon:* And it was upon an Indenture of Leaſe made on 23d *January* 1707, by the ſaid *Thomas Lant* deceaſed, who was ſeized of certain Meſſuages Ground and Premiſſes (mentioned in the Indenture,) of the One Part, and the ſaid *Thomas Wilſon*, on the other Part; whereby, in Conſideration of 200*l.* to be laid out in upon or about rebuilding upon the Ground and Premiſſes thereby demiſed, and other Covenants, the ſaid *Tho. Lant* did demiſe to the ſaid *Tho. Wilſon*, all that Piece of *Grouna*, AND *all the Meſſuages* Tenements Houſes *&c*, *thereon ſtanding*, in *Suffolk Place*, in the Pariſh of *St. George the Martyr &c*, butted and bounded *&c*, from *Chriſtmas* 1715 for 43 Years at 17*l. per Annum* Rent.

Thomas Wilſon, the Leſſee, covenants to lay out the ſaid Sum of 200*l.* within 15 Years, in ERECTING *and* REBUILDING of Meſſuages or Tenements or ſome other Buildings, *upon the Ground and Premiſſes*; And from Time to Time, and at all Times, all and ſingular the ſaid Meſſuages or Tenements *ſo* TO BE *erected*, with all ſuch other Houſes Edifices *&c*, as ſhould at any Time or Times THEREAFTER *be erected*, *&c*, to repair *&c:* And THE SAID DEMISED PREMISSES, *with* all ſuch *other* Houſes *&c*, SO WELL REPAIRED *&c*, at the End or other ſooner Determination of the ſaid Term, *to deliver* up *&c*.

Wilſon entered, *Tho. Lant* died 29th *May* 1722, ſeiſed: And the Reverſion deſcended to *John Lant*, his Son and Heir.

On 24th *March* 1738, *Wilſon* aſſigned the Term to *John Norris:* Who entered.

On 24th *March* 1728, *John Lant* died ſeized: And the Reverſion deſcended to the Plaintiff, his Brother and Heir.

The Breaches aſſigned were, firſt, That after the Term came to *J. Norris*, and after the Plaintiff became ſeized of the Reverſion, and whilſt the ſaid *J. N.* was poſſeſſed, *viz.* on

‡ on 1 *May* 1745, the ſaid *J. N.* in his Life-time permitted ALL *the ſaid demiſed Meſſuages* to be uncovered &c; by reaſon whereof the Walls of the *ſame demiſed Premiſſes* were out of Repair; and goes on to other Damages, ſtill calling them (all along) "*the ſaid demiſed Premiſſes.*" 2dly. That the ſaid *J. N.* did permit 6 Meſſuages, Parcel of *the ſaid* "*demiſed Premiſſes,*" to be *proſtrated*; and to remain ſo till his Death. 3dly. That the ſaid *J. N.* on 1ſt *March* 1747, did *pull down* 6 other Meſſuages then erected and built on the ſaid demiſed Premiſſes. ‡ Page 288.

Plea as to the 1ſt Breach, That the ſaid *T. Wilſon* or his Executors did not within 15 Years, or at any other Time lay out 200*l.* or any Part thereof, *in erecting or rebuilding* of any Meſſuages: And that the ſaid Meſſuages had *never* been rebuilt. As to the 2d Breach, the ſame Plea. As to the 3d Breach, "*Non infregit Conventionem.*" To all the Breaches, the ſame Plea as above to the 1ſt and 2d over again, "That *T. W.* never laid out 200*l.*" and "That the "Meſſuages never were rebuilt;" and "That *J. N.* after "He became Aſſignee, and after the Plaintiff became ſeiſed "of the Reverſion, 1ſt *March* 1753, died inteſtate, ſo poſſeſſed; "and Adminiſtration was granted to the Defendant: By "Virtue of which He entered; And being ſo poſſeſſed, be-"fore exhibiting the Plaintiff's Bill, *viz.* 24th *June* 1754, "aſſigned the demiſed Premiſſes to One *John Townſend* for "the Reſidue of the Term; who entered, and is poſſeſſed."

The Plaintiff demurs generally to the 1ſt Plea to the 1ſt Breach, and alſo to the 1ſt Plea to the 2d Breach; ſpecially, to the 1ſt Plea to the 3d Breach; generally, to the 2d Plea to the 3d Breach; and generally, to the laſt Plea to all the Breaches. There was alſo a Plea of *Non proſtravit:* And a Demurrer to it.

The Defendant joins in Demurrer, to all the Demurrers.

Mr. *Winn*, for the Plaintiff, urged that the Pleas were no Anſwer; and that they neither confeſſed nor avoided the Charge in the Declaration, nor denied it,

Mr. *Gould contra*—for the Defendant, gave up the Pleas: But He objected to the Declaration, *viz.* That the Intention of the Parties was to confine the Repairs to the Buildings *thereafter* TO BE erected: as it appears that there were *No* Buildings (of any Conſideration) upon the Land, at *the Time* of the Leaſe; nor is there any Averment in the Declaration "That the Leſſee" *(Wilſon)* "*ever did erect* "any ſuch." Which Averment ought to have been made, in order to have maintained this Action: For, *without* ſuch

† P. 289. † Erection, the Defendant *could not be obliged* to repair. And a Plaintiff muſt ſhew every Thing in his Declaration, that is neceſſary to maintain his Action.

The Words "*the ſaid demiſed Premiſſes*" muſt relate to thoſe in the Beginning of the Covenant; and therefore only mean and intend "That he ſhould leave *them*, *viz.* the new "erected and rebuilt Edifices, in Repair, at the *End* of the "Leaſe."

The Covenant is *future:* And the Leſſor could not have any Action upon it, *till* the *End* of the Term.

It appears by 5 *Rep.* 21. *a.* Sir *Anthony Main*'s Caſe, that if a Man lets a Manor for Years; and the Leſſee covenants to keep the Houſes of the Manor and whatſoever was within the Manor, in as good Eſtate as he found them, during the Term; And the Leſſee makes Waſte in the *Houſes*, and in cutting *Oaks*; the Leſſor may bring an Action of Covenant, before the End of the Term, for the Oaks; For, *for them*, it was impoſſible that the Covenant could be performed: But 'tis otherwiſe, of the *Houſes*.

And with this agrees *Fitzh. Nat. Brev.* 8vo. Edition, 324. Letter I. the ſame Law. Though if he ſells Timber, &c, [if he do Waſte in Wood] he may have an Action of Covenant DURING *the Term:* "For *that* (ſays the Book) cannot "be repaired."

He likewiſe cited 1 *Salk.* 199. The Caſe of *Greſcot* v. *Green*, Where the Leſſee covenanted for him and his Aſſigns, to rebuild and finiſh a Houſe *within ſuch a Time*; And *after* the Time expired, the Leſſee aſſigned over the Premiſſes, the Houſe *not* being then built and finiſhed according to the Covenant: And *per Holt* Ch. Juſt. This Covenant ſhall not bind the Aſſignee; becauſe it was *broken before the Aſſignment*. *Aliter*, if broken *after* the Aſſignment; As if the Leſſee had aſſigned *before* the Time had been expired. Which Caſe was cited to prove "that the Action did not lie in the preſent "Caſe; *becauſe* the Aſſignment was made *after* the 15 Years "were expired."

Mr. *Winn*—The Record is now to be conſidered as upon a General Demurrer to the whole Declaration: And I ſhall rely on the 1ſt and 2d Breaches, and not on the 3d, (which has, I own, received a proper Anſwer, by Iſſue being offered.)

Covenants are to be conſtrued for the Benefit of the *Covenantee*; not of the *Covenanter*.

Theſe

† Theſe are Buildings demiſed: And 200*l.* is agreed to be laid out in Repair of *them*, OR in erecting *New* Ones: Then there is a Covenant "to repair the Buildings *to be* "erected on the demiſed Premiſſes; and the SAID DEMISED "PREMISSES, *and others* ſo to be erected, ſo being well "and ſufficiently repaired &c, to leave &c." † P. 290.

This intimates that the *demiſed* Buildings, *as well* as the New Erections. were to be kept in Repair. Here is ſufficient, from whence to collect the Intention and Meaning of the Parties, to be ſo: Which will amount to a Covenant. And upon this General Demurrer, the Court will not intend that the 200*l.* was laid out only on the *other* Buildings newly to be erected.

LORD MANSFIELD—

I chooſe to look into it, and conſider it a little. No particular technical Words are requiſite towards making a *Covenant*.

Mr. Juſt. DENISON—The Queſtion only is Whether the Words "*demiſed Premiſſes*," are omitted, by Miſtake, in the former Part of the Covenant; or ſuperaded, by Miſtake, in the latter: For there appears to be a Miſtake in either One or the Other, in the Deed itſelf. The Leaſe is a Building Leaſe.

Now the Premiſſes *then ſtanding* were to be *pulled down*. Therefore it could ſcarce be intended to covenant to repair *them*. The Covenant "to repair," is confined to the Tenements *to be* erected: The Covenant "to leave in Repair" extends to the *demiſed* Premiſſes, *together with* all ſuch Other as ſhall be thereafter erected.

Mr. Juſt. FOSTER—'Tis a Building *and* Repairing Leaſe.

In order to look into the Leaſe, it ſtood over, with a CURIA ADVISARE VULT.

And now, (having conſidered it till the next Day only,) LORD MANSFIELD ſaid, WE are extremely clear, That not only the *Words* of the Covenant, but alſo the *Intent* of the Parties, manifeſtly ſhew that it was *not* meant that any of the Money ſhould be laid out on the *Old* Buildings: But that *they* were to be pulled down; and that whatever he SHOULD *erect*, with the 200*l.* or otherwiſe, for his own Convenience, ſhould be kept in Repair,

The words "*demiſed Premiſſes*" are put in *Oppoſition* to the Buildings that were TO BE *erected* thereupon with the 200*l.*

And

† P. 291. † And the Covenant "to deliver up," is agreeable to this Conſtruction: That Covenant being, to leave "the "demiſed Premiſes, together with all ſuch other Houſes "&c, as *ſhould be afterwards erected &c*, ſo well repaired."

It is therefore clear againſt the Plaintiff, upon the 1ſt and 2d Breach: and Mr. *Winn* acknowledges it to be againſt Him on the *third*.

Therefore the COURT gave
JUDGMENT for the DEFENDANT.

Wedneſday, 4th May, 1757.

Frazer's Caſe.

The COURT *was full.*

THIS *Frazer*, being an Attorney of this Court, had taken for his *Article-Clerk*, One *Smith*, a *Turn-key* of the King"s Bench Priſon: a full-aged Man, and who ſtill continued to act as Turn-key. It did not appear that any Money was paid; or that the Maſter fed lodged or entertained the Clerk, (though the Articles indeed covenanted "that he ſhould:") Nor did the Clerk officiate for *Frazer*, but in Matters relating to the Priſon. It appeared that *Frazer* had, ſince theſe Articles, (which were dated only two Years ago, in 1755) become concerned in 63 Cauſes, on Behalf of the Priſoners in Gaol.

This whole Matter being diſcloſed to the Court upon the Application of Mr. *Moſs*, the Clerk of the Papers of the Priſon,

The COURT were *All* very clear that theſe Articles were *merely colluſive*; that the Whole was a *Contrivance* between *Frazer* and the Turn-key, to ſecure the Buſineſs ariſing from the Priſoners; that the Exerciſe of the Office of a *Turn-key in a Priſon* was, both in itſelf, and alſo according to the Intent and Spirit of the Act for regulating Attornies, a very improper Education for the Profeſſion of an Attorney, And that theſe Articles ought to be *cancelled*.

And accordingly, they were, by the Expreſs Order of the Court,

CANCELLED in COURT (by Maſter *Clark*) and directed to be kept in Court, and not delivered back.

Pierſe

* Pierſe Eſq; *verſ.* Lord Fauconberg. * P. 292. Saturday, 7th May 1757.

(*Lord Commiſſioner* Wilmot *abſent, in Chancery.*)

THIS was a Trial at Bar, on the Civil Side of the Court, by a Special Jury of the County of *York.*

The Queſtion was concerning a Right to track or tow Veſſels, upon the Banks of the River *Tees* (which divides *Yorkſhire* from the County-Palatine of *Durham*) from *Yarum*-Bridge up to *Low Worſall.*

There had been a former Iſſue tried, "Whether the River "*Tees* was a *navigable* River, from *Yarum*-Bridge to *Low* "*Worſall;*" which Iſſue had been found in the Affirmative.

And the preſent Trial was a new Trial, (a ſecond new Trial indeed) directed by the Court of Chancery, upon an Iſſue "Whether the ‡ Plaintiff had a Right to a Track-"path on each Side of the River (alternatively according "to the Courſe of its Banks) for the Convenience of Tow-"ing: without Let or Hindrance from, or paying any Ac-"knowledgment to the reſpective Owners of the Soil."

The Trial laſted till about Two o'Clock on *Sunday* Morning: At which Time, the Jury (after ſtaying out about a Quarter of an Hour) brought in a Verdict,

For the PLAINTIFF.

Rex *verſ.* Roger Philips, Mayor of Carmarthen. Mond. 9th May 1757.

(*Lord Commiſſioner* Wilmot *abſent, in Chancery.*)

THE Defendant had pleaded to an Information in Nature of a *Quo Warranto* exhibited againſt him, "to "ſhew by what Authority he acted as a Mayor of this "Borough," a Title of Election and Swearing *under a* MANDAMUS purſuant to 11 *G.* 1. *c.* 4.

‡ *N. B.* The Plaintiff did not claim this, as a *diſtinct peculiar* Right of his own; but as a *general* Right claimable by *all* Perſons whoſe Occaſions led them to navigate this River.

But

†P. 293. * But the *Swearing* was (by Miſtake) ſet forth to have been in the ſame Manner as it ought to have been in Caſe the Election had been upon the CHARTER-Day.

Upon the Replication, no leſs than 14 Iſſues were joined: Which went down to be tried before Ld. Ch. Baron *Parker*, as Judge of *Niſi prius*. But one of the Iſſues (the 9th) was taken upon the *Swearing* thus (erroneouſly) alledged to be before ſuch Perſons as were only proper to preſide UPON *the* CHARTER-DAY; (*juſt as if it had in Fact been an Election under* THE CHARTER:) Which was a mere *Miſtake* in the Defendant's Plea; For his REAL *Swearing* in Fact was *right*, *viz.* AGREEABLE to *the Directions of* 11 *G.* 1. concerning the Manner of being ſworn under and purſuant to a Writ of *Mandamus*. The Plea was worded thus, as to his being ſworn in; *viz.* "That after the Defendant had been ſo elect-" ed and choſen to be Mayor, *&c*; and before He took " upon himſelf to execute the ſaid Office; to wit, *at that* " SAME *Meeting and Aſſembly ſo holden* upon the ſaid *Friday* " the ſaid 30th Day of *May* in the 28th Year aforeſaid in " Manner aforeſaid, He the ſaid *Roger Philips*, IMMEDI-" ATELY *after* his ſaid Election, did *then and there* ACCORD-" ING to *the* DIRECIONS *of the* LETTERS PATENT *of the* " *ſaid late King* Henry *the* 8*th* TAKE *his Corporal Oath*, upon " the Holy Evangeliſts of God, BEFORE *John Evans* " Merchant, *George Jenkins*, *Daniel James*, *William Sears*, " *Lazarus Thomas*, *Samuel Morgan*, *John Evans* Carpenter, " *John Evans* Currier, *Richard Leigh*, *George Bayle*, *Tho-*" *mas Richard* and *Lewis Philipp*, then and there being " TWELVE *diſcreet and honeſt Men of the* BURGESSES of the " ſaid County-Burrough, rightly well and faithfully to ex-" ecute the ſaid Office of Mayor of the ſaid County-Burrough, " in all Things touching and concerning the ſaid Office; " They the ſaid *John Evans* Merchant, *G. J. D. J. W. S.* " *L. T. S. M. J. E. C. J. E. C. R. L. G. B. T. R.* and " *L. P. then being* TWELVE *diſcreet and honeſt Men of the* " BURGESSES *of* the ſaid County-Burrough *then and there* " APPOINTED ACCORDING *to the* DIRECTIONS *of the ſaid* " LETTERS PATENT, laſt before mentioned by the ſaid " then Common Council of the ſaid County Burrough BE-" FORE WHOM the ſaid *Roger Philips*, ſo elected and choſen " Mayor of the ſaid County Burrough as aforeſaid, WAS *to* " TAKE *his ſaid* OATH: ~~And that He the ſaid~~ *Roger Phi-*" *lips* was THEREUPON; then and there, *in due manner*, *ad-*" *mitted into the ſaid Office* of Mayor of the ſaid County-" Burrough. BY VIRTUE WHEREOF He the ſaid *Roger* " *Philips*, on the ſame *Friday* the ſaid 30th Day of *May* " in the 28th Year aforeſaid and from thence continually " afterwards, for, *&c*; was Mayor *&c*. *And by* THAT " *Warrant*, He the ſaid *Roger Philips*, on, *&c* and from, *&c*,

"until,

" † until, &c, did there uſe and exerciſe the ſaid Office of † P. 294.
" Mayor, &c; And for and during all the ſaid Time, did
" there Claim, &c."

The *Lord Chief Baron*, who tried the Cauſe, reported that He was of Opinion, upon the Trial, " That upon " the 9th Iſſue, the Defendant *could not give Evidence* of " a *different* Swearing from what He had alledged *upon the* " *Record*;" And " That upon the 10th Iſſue" (taken upon the Allegation of being *by Virtue thereof* Mayor, &c.) " He *could not vary* from the *Title before ſet out*, by Virtue " whereof He *claimed* to be Mayor." And he had directed the Jury to find for the King: and they found a Verdict accordingly. And he alſo reported " That no Evidence " was entered into, upon *any* of the Iſſues; And that " Verdicts were found for the *King* upon *all* of them; But " that this was *agreed* to be *without Prejudice* in any *fu-* " *ture Trial*."

Mr. *Norton*, Mr. *Morton*, and Mr. *Price*—for the Defendant had thereupon moved for and obtained a Rule for the Proſecutors (who had thus gotten a Verdict,) to ſhew Cauſe " why there ſhould not be a *new Trial*;" upon an Inſinuation " that the Judge who tried the Cauſe, had " *miſdirected* the Jury:" Which *Miſdirection* conſiſted, as they alledged, in this, *viz.* " That the Judge had precluded the Defendant from giving any Evidence to prove his " Swearing, AS *ſet forth* in the ſaid 9th Iſſue; the Judge " apprehending and ſo directing the Jury, that it could be " of *no Kind of Service to the Defendant*, to be admitted to " prove an Iſſue, which IF *proved or even admitted*, could " NOT *at all tend to make out his Right*; For that if this " Swearing *as* UNDER *a* CHARTER-Election were to be *ad-* " *mitted*, yet ſtill it would not appear *in* ANY *Part of the* " *Record*, that He was *regularly ſworn* UNDER *a* MANDA- " MUS-Election; Which was the *Species of Election* under " Which he *claimed*."

Sir *Richard Lloyd*, Mr. Serjeant *Poole*, and Mr. *Aſton* were prepared, as they ſaid, to ſhew Cauſe, by convincing the Court " that the Direction of the *Judge was* RIGHT; " and conſequently, that the Verdict *ought to ſtand*."

LORD MANSFIELD—The Direction of the Judge was certainly *right*. Therefore, if You ſhould prevail in this Application for a new Trial, it could be of no Service: For, AS *the Record ſtands*, the *ſame* Direction muſt be *given again*:

Yet I am very deſirous to *cure* this Slip, if poſſible: For the *Merits* have *never been tried*.

Conſider whether the Verdict may not be ſet aſide; And the Parties admitted to plead AGAIN. The

† P. 295. † The RULE was ENLARGED; with this *Addition, viz.* to ſhew Cauſe "why the Verdict ſhould not be ſet aſide, "AND *a Repleader awarded.*"

Mr. Serjeant *Poole*, for the Proſecutor, now ſhewed Cauſe againſt ſetting aſide the Verdict and awarding a Repleader. And He alledged that, though there ſhould be a Repleader awarded, yet the *whole Record* muſt nevertheleſs *ſtand* as it is at preſent.

As to Repleaders in General—He cited 6 *Mod.* 1. The Caſe of *Staple* v. *Haydon*—(1ſt. Reſolution:) It can only be on ſuch an impertinent Iſſue, as the Court can give *no* Judgment upon.

Mr. *Norton*, Mr. *Morton*, and Mr. *Price*—*contra*—for the Defendant—The Iſſues are not all found againſt us, *abſolutely*; but *without Prejudice* to any future Diſpute, except as to the 10th Iſſue.

Mr. *Norton*, Mr. *Morton*, and Mr. *Price* ſtated the Miſtake: Which they ſaid was thus; *viz.* The Defence ſet up was "An *Election of the Defendant under a Mandamus*, "iſſued purſuant to 11 *G.* 1." And in ſetting out his Oath of Office, he avers it have *been* DULY *taken*; and ſhews it to be an *Oath*, taken by him *upon this Election*, and ſets out the *right and proper Oath of Office*; but the Plea, 'tis true, goes on, (following, by Miſtake, a Precedent of a Plea of an Oath of Office taken under an Election upon the proper *Charter*-Day,) and alledges it to be a Swearing *at the ſame Meeting ſo holden*, &c, BEFORE *Perſons* who were only proper to preſide upon the CHARTER-*Day*; *viz.* (BEFORE 12 *Burgeſſes*, &c.)

Which Swearing *before* theſe *improper* Perſons, they urged to be totally *immaterial:* And that, for the Sake of attaining Juſtce, it ought to be *ſome* how or other, ſet right; the TRUE *Queſtion* having *never been tried, viz.* "Whether He took the Oath of Office, *agreeably to the* "DIRECTIONS OF 11 *G.* 1."

Therefore it ſhall either be *amended*, OR a *Repleader awarded:* For upon the preſent Record, there is *no* Juſtification *at all*; And therefore the Iſſue joined is *totally immaterial.* The Caſe of *Staple* v. *Haydon*, 6 *Mod.* 1. is almoſt in Point. 1 Ld. *Raym.* 707. S. C. [1 *Salk.* 173. 216. S. C.]

This is a good Plea in *Subſtance*; but ill pleaded in Point of *Form.*

They *ought to have* DEMURRED to this Part of the Plea; and *not* to have taken *Iſſue* upon it: For it is a Matter of

† *Law*, " Whether the taking *this* Oath would have juſtified † P. 296.
" the Defendant." And a Verdict cannot make that good, which the Court ſees cannot be ſo in Law. Therefore this Verdict is utterly *void*: Juſt like that in *Hobart* 112. *Taſker* v. *Salter*.

And ſuch Repleaders, in Informations, are no Novelties. For in 1 *Ventris* 122. the Caſe of ‡ *Reynel* v. *Heale*; a Repleader was awarded, becauſe the Iſſue was mis-joined.

And they *offered to pay Coſts*, in order to have this Matter ſet right: And inſiſted that is but juſt and reaſonable; eſpecially, as many *other* Perſons Rights depend upon the Right of this Mayor.

They alſo cited *Cro. Eliz.* 245. the Caſe of *Love* v. *Wotton*—Where a Repleader was awarded after Verdict; the Defendant having miſpleaded the Statute. The Reaſon of awarding the Repleader there, muſt be, " becauſe the *true* " *Merits* had *never been tried*."

They even urged farther, that it might well be taken, upon the Face of the Record, " that he *was* ſworn before the " *proper* Perſons:" it being alledged " that it was at the " SAME Meeting then and there ſo holden."

But they inſiſted that at moſt, this is *only Form*.

As to the Repleaders in general——They cited 1 Sir *J. S.* 394. The Caſe of *Rex* v. *Philips* Mayor of *Bodmyn*; Where the Defendant's Title was *clearly defective*, and confeſſed an Uſurpation; And therefore as the *Merits appeared* to be againſt the Defendant, the Repleader was not indeed there granted: But the general Poſition ſeems to be, " that it " *might*, *otherwiſe*, have been granted."

Mr. Serjeant *Poole*, Sir *Richard Lloyd*, Mr. *Aſton*, and Mr. *Nares pro Rege*—argued that it is needleſs to grant a Repleader, where there is *ſufficient* appearing upon the Record, whereupon to give Judgment *againſt* the Party, *excluſive* of the Part which is pretended to be immaterial.

Nor ſhall a Repleader be awarded, where the Defendant has ſet forth a *defective Title*.

‡ *N. B.* This was a *Qui tam* Information, at leaſt; if not a *Qui tam Action*. The Book is inconſiſtent with itſelf; but the Title of the Cauſe ſhews that it was an *Action*.

Now,

* P. 297. * Now, certainly, this is a *defective Title:* He appears to be ſworn before *improper* Perſons; And does *not at all* appear to *have been* ever ſworn before the *proper* Ones.

This is *not* a mere *defective* MANNER OF PLEADING; like *Cro. Jac.* 434. the Caſe of *Holms* v. *Broket*—where Iſſue was joined on a Plea of Payment *before* the Day; or *Hob.* 112. the Caſe of *Taſker* v. *Salter*; where the Iſſue (upon the *Way*) was in Effect no Iſſue at all.

But this is abſolutely a *defective* TITLE; a Swearing before improper Perſons; and is like 6 *Mod.* 1. the Caſe of *Staple* v. *Haydon.* And they cited *Cro. Eliz.* 214. the Caſe of *Lacy* v. *Reynolds*; where though the Iſſue was immaterial, yet the Plea confeſſing the Words, the Court gave Judgment as upon a Confeſſion. So, *Carthew* 371. The Caſe of *Jones* v. *Bodinner:* and 1 *Salk* 173. S. C. a like Reſolution. So, 1 Ld. *Raym.* 390. the Caſe of *Pitts* v. *Polehampton.*

But if a Repleader ſhould be granted as to THIS Iſſue, yet *enough* (beſides this) will ſtand upon this Record to intitle us to Judgment for the King.

Repleaders are never awarded for the Sake of the *Parties*; but for the *Sake of the* COURT.

And this is the Reaſon why there are *no Coſts* upon Repleaders; As appears by 2 *Salk.*—Title Repleader. p. 579. [Which is an Abridgment of the Caſe of *Staple* v. *Haydon* in 6 *Mod.* 1. and 1 Ld. *Raym.* 707.]

Nor ſhall Repleaders ever be awarded, where *ſufficient appears upon the Record, whereupon* the Court can *give Judgment.* They ſhall not be awarded, ONLY *becauſe* the Party has MISTAKEN *his Caſe:* They ſhall never be awarded, but where the Iſſue is SO *immaterial* that the *Court* cannot tell how to give Judgment. In the Caſe of *Serjeant* v. *Fairfax* in 1 *Lev.* 32. it is laid down by *Twyſden*, and agreed by the Ch. Juſtice and *Wyndham*, That "an immaterial Iſſue is, "where, upon the Verdict, the Court cannot know for whom "to give Judgment; whether for the Plaintiff, or for the "Defendant."

It depends upon the Plea pleaded; not upon the real Merits: For though the Iſſue be *improper*, yet Judgment ſhall be given; as is expreſsly laid down in the ſame Caſe of *Serjeant* v. *Fairfax*——1 *Lev.* 32. "If an IMPROPER "Iſſue is taken, and Verdict given thereon; Judgment "ſhall be given thereupon; be it for the Plaintiff, or "for the Defendant." *Cro. Jac.* 288, the Caſe of *Tampion*

* *Tampion* v. *Newſon and Bridget his Wife:* The Plea of the Feme, without the Baron was no Plea at all, nor confeſſed any thing. In *Bro. Repleader* 55. It did not appear how much the Executors had; who pleaded "riens inter maines," which was found againſt them. *Cro. Eliz.* 245. The Caſe of *Love* v. *Wotton*, (where the Statute of Uſury was miſrecited,) was a Caſe where *no Judgment could be given:* For the Court were *bound* to know the Statute; and that there was no ſuch Statute as was pleaded, which was a Statute made the *ſixth* of *February*. * Page 298

In the preſent Caſe here is NO FAULT *in the Pleadings.* Therefore where ſhall the Repleader begin? This Caſe is NOT *the Subject Matter of a Repleader:* This is *only a* DEFECTIVE TITLE.

It would be an ERROR, to grant a Repleader, where the Court *can* give Judgment *upon* the Pleadings *already* before them.

Now here, the Defendant who claims to be Mayor has NOT *ſhewn* "That he was *ſworn* before the *proper* Perſons;" And the Court *cannot preſume* it. He is aſked "*Quo War-*"*ranto*" he acted as Mayor: And his Defence is *this*, by a "proper Election and (*improper*) Swearing;" And that "EO "*Warranto*," he acted as Mayor. But this plainly appears to the Court to be NO Warrant at all. Therefore the Court muſt give Judgment *againſt* him.

And the Chief Baron certainly determined right: For a Man cannot plead *One* Caſe, and then prove *Another*.

Hob. 112. The Caſe of *Taſker* v. *Salter* is not like this Caſe. *This* is a *Fact*; on which the Jury *have* judged.

And ſurely it does not follow, nor can it be taken upon the Face of this Record, that becauſe he was ſworn *at* THAT ASSEMBLY, He muſt therefore be ſworn before the *proper* PERSONS.

On the contrary, it is moſt manifeſt that He has *not* ſet out a *complete Title* to exerciſe the Franchiſe: And therefore the Court muſt give Judgment againſt him.

The *other* Iſſues were *never proved:* And even this bad Title, ſet up by this Iſſue, is found *falſe*; *viz.* "That He was "NOT SO *ſworn* in, as he has pleaded."

Judgment ſhall be given againſt the Defendant, even upon an Iſſue misjoined, *if found* FOR *the Plaintiff*. *Cro. Eliz.* 778. The Caſe of *Dighton* v. *Bartholomew*. 5 *Co. Rep.* 43. *Nichol's* Caſe. *Cro. Jac.* 377. The Caſe of *Edward Maria Wingfield* v. *Bell.* 2 *H.* 7. 11. *b. Rex* v. *Herle*. Which Caſe proves that if a Man ſets up a Right, *different* from

‡ P. 299. ‡ from his Title, it ſhall be againſt him; And he ſhall *not* ſet up *another* Title, *afterwards*.

The Court may here give Judgment as upon a Confeſſion, when the Iſſue is immaterial, and the Miſtake not amendable: And there ſhall in ſuch Caſes, be no Repleader. *Carthew* 371. The Caſe of *Jones* v. *Bodinner*, expreſly. 5 *Mod.* 226, 227. S. C. *Cro. Jac.* 678. The Caſe of *Johns* v. *Ridler*: Where tho' the Iſſue was immaterial, yet being found *for the Plaintiff*, it was adjudged for him, upon the Defendant's confeſſing the Ejecting.

In the Caſe of *Love* v. *Wotton*, *Cro. Eliz.* 245. the Court *could not* give a complete Judgment.

Cro. Car. 25. The Caſe of *Knight* v. *Harvy* Adminiſtrator of *Harvey*, *M.* 1. *C.* 1. (where the Defendant pleaded an impoſſible Judgment, and *riens en ſes maines*, but only to ſatisfy it; and the Plaintiff replying, the Iſſue was found for the Plaintiff, and He had Judgment; is a Caſe parallel to the preſent: For as the Judgment there pleaded was a bad Judgment, ſo this is certainly a BAD *Swearing in*. Therefore the Court will here give Judgment upon the *Information*; as they did upon the Plaintiff's Declaration there, notwithſtanding that impoſſible Iſſue being found, it being found for the Plaintiff.

Here, Both the Election AND Swearing in, ought to have been well pleaded: Neither is a Defence, of itſelf alone.

And the Court cannot take Notice of the *Fact*, *otherwiſe than* AS it has been *pleaded*.

Therefore Judgment may be given, as upon a Confeſſion, in the preſent Caſe: For the Defendant *ſhews no Right at all*, to act as Mayor.

So that, upon the Whole, Judgment ought to be entered for the King, *upon the Face* this Record. To prove which, they cited 2 *Strange* 873. The Caſe of *Broome* v. *Rice & al'* in C. B. as in Point: Where, though the Juſtification confeſſed the Cauſe of Action, in Effect, yet the Plaintiff replying, " de in- " juria ſua propria abſq; tali Cauſa," Iſſue was thereon joined, and found for the Defendant; But the Verdict was ſet aſide; and Judgment ordered to be entered for the Plaintiff, and a Writ of Inquiry of Damages to iſſue.

Mr. *Norton* in Reply ——

The SUBSTANTIAL Part of this Plea, is the " being " *ſworn at this Aſſembly immediately after* the Election:" And

" ‡ And the PERSONS *before whom* the Swearing is alledged ‡ P. 300.
" to have been," may be conſidered as *Surpluſage*. *If ſo*, We ought to have been let in, at *Niſi prius*, to prove our Plea: *If* it is *not* ſo to be taken, We ought now to be let in, either *to amend*, or to *replead*.

This would plainly be a *good Bar*, IF *well pleaded*. Therefore the Court will, for the ſake of Juſtice, grant a Repleader.

The Title ſet up by the Defendant, is an *Election under a Mandamus*; and the Defendant has accordingly ſtated an Election made purſuant to the Directions of the 11 *G.* 1. and a Swearing in, *purſuant to it*: But He goes on, and particularly ſhews a Swearing in before 12 *Burgeſſes*, the CHARTER-Officers, (which ſhould have been alledged to be before " The Perſons directed by the 11 *G.* 1. *viz.* the then *preſiding* " *Officer*;") And this upon Iſſue taken thereon, is found *againſt* him. Now ſurely this has *not* tried the MERITS: This Iſſue was quite *immaterial*. And therefore there ſhall be a Repleader: And this muſt be a Repleader of our *whole entire* Title.

But they ſay that " this is a DEFECTIVE Title; not a " mere *improper* Title: And that therefore Judgment ſhall " be given againſt the Defendant."

Now this is *not* the Rule of Repleaders. Indeed if the Bar be evidently NOT *a good Juſtification*, it is idle to grant a Repleader: But *otherwiſe*, a Repleader *ſhall* be awarded. In *Cro. Jac.* 5. The Caſe of *Coxe* v. *Cropwell*, The Huſband pleaded " Not guilty," when no Tort was ſuppoſed in him; So that this was a Caſe where the real Queſtion had not been tried: And *therefore* the Court granted a Repleader.

And the Party who makes the firſt Fault, may, notwithſtanding that, pray a Repleader.

Wherever the Court ſee, upon the whole Record, that the Iſſue joined will *not try the true Queſtion*, the Court will grant a *Repleader*.

The Caſe of *Serjeant* v. *Fairfax*, 1 *Lev.* 32. P. 13 *C.* 2. *B. R.* is ſtrongly for Us. It was a *bad Plea*; it proceeded originally *from the Defendant*; an immaterial Iſſue was joined; and a Verdict was ¶ *againſt him*: And *yet* a Repleader was awarded; BECAUSE *the Merits* HAD NOT *been* determined, and the Court could not therefore know *for whom* to give Judgment.

¶ No: The Verdict was for the Defendant; and the Plaintiff moved for a Repleader. Indeed Twiſden ſaid that it was the ſame Thing, " be the " Verdict for the Plaintiff, or for the Defendant."

But

‡ P. 301. ‡ But they ſay that " Here is *ſufficient* for the Court to " give Judgment upon."

I anſwer, that theſe are not to be taken as *independent unconnected* Iſſues; but as One *entire Title*, though conſiſting indeed of various diſtinct *Parts*. And he ſaid He could ſee no Reaſon for the Crown's taking ſuch a Number of Iſſues, upon theſe *Quo Warranto* Informations: Indeed perhaps the ſingle Iſſue of " Not Mayor," would take in the Whole.

LORD MANSFIELD—

General Rules are wiſely eſtabliſhed, for attaining Juſtice with Eaſe, Certainty, and Diſpatch.

But the Great End of them being " *to do Juſtice*," the Court are to ſee that it be *really* attained.

In order to diſcover what was juſt upon the preſent Occaſion, He ſaid He would conſider this Caſe in two Views; *viz.*

1ſt. Upon the mere Foot of the *Swearing*, as it is here pleaded and put in Iſſue; and

2dly. What Alteration is made by the *other* Iſſues, and the *Verdicts* upon them, found in the Manner as they have here been.

Firſt—If *this* Iſſue upon this Swearing-in, had ſtood alone, this had been an *immaterial and void* Iſſue; as it tends to *prove Nothing*, *either* for the *Crown*, or for the *Defendant*; And from which, *No Concluſion* can be drawn, *either* Way.

It appears too, upon the Record, that this MIGHT *have* been ſo pleaded, *as* to have ſhewn whether He had, or had not a Right: (Suppoſing the Queſtion to be *confined* to this ſingle Iſſue.)

What is the Rule of Law then, as to ſuch an *immaterial* Iſſue joined, and *Verdict* upon it?

It is, " That when the finding upon it does NOT *de-* " *termine the Right*, the Court *ought* to award a Repleader: " *Unleſs* it appears from the whole Record, that NO *Manner* " *of Pleading* the Matter, COULD *have availed*."

The principal Caſes to prove this are amongſt many others to the ſame Effect.)

‡ 6 *Mod.* 2. The Caſe of *Staple* v. *Haydon*, [1ſt Reſolution ;] where the Court held "That a Repleader is to be a- ‡ P. 302.
"warded, when *ſuch* an Iſſue is joined, as the Court after "Trial thereof, cannot give a Judgment: as being im- "pertinent, And NOT *determining the Right*:" (I lay the Streſs on theſe Words, "And NOT *determining the Right*.")

Moore 867. The Caſe of *Taſker* v. *Salter*, [S. C. with *Hobart* 112.] The Verdict paſſed upon a void Iſſue: And the Court awarded a Repleader. It was as no Iſſue at all, and impertinent, as pleaded.

Here, it MIGHT *have been* pleaded *right*: But *as* there pleaded, it did not conclude; And therefore the Court could not determine the Right.

So the Caſe in *Cro. Eliz.* 245, *Love* v. *Wotton*, (A Plea of the Statute of Uſury, upon the uſurious Bond—) There, as the Statute was pleaded, The Concluſion "that the Ob- "ligation was taken by Uſury &c," was immaterial: But the Statute *might* have been pleaded right; and then it would have been a good Defence. And *therefore* the Court awarded a Repleader.

But there is a later Caſe, (And the Courts have been more liberal of late Years, in their Determinations, and have more endeavoured to attend to the *real Juſtice* of the Caſe than formerly;) And this is the Caſe of *Tryon* v. *Carter*, *M.* 8 *G.* 2. which is reported in 2 *Strange* 994. and is a very material Caſe: "A Bond conditioned for Payment of Money "*on, or before* 5th *December*. Plea of Payment *on* 5th *De-* "*cember*; Replication, Iſſue, and Verdict for the Plaintiff." This was holden to be an immaterial Iſſue; and a Repleader was therefore awarded: Though it would have been concluſive, if found for the Defendant; but did not conclude, when found for the Plaintiff. Therefore, (though that was a Slip of the Defendant) as it did not determine the Queſtion, a Repleader was awarded.

The Caſe that has been mentioned, of *Rex* v. *Philips*, *M.* 7 *G.* 1. in 1 *Strange* 394. is material, for the Reaſon given by Ld. Ch. J. *Pratt*. For if the Juſtification is ſuch in Point of Matter and Subſtance, as could not, if put into *any* Form of Words, be material with regard to the Defendant by Way of Defence, it is in vain to grant a Repleader; It being to no purpoſe to do ſo, where the *Caſe itſelf cannot be amended*, or would be at all material, if put in *any* Shape whatſoever: Which was the Caſe; For it amounted to a Confeſſion of the Uſurpation, as was there holden. And if

‡ P. 303. ‡ it did, then he very rightly ſaid "that *if* the Court ſhould "grant a *Repleader*, the Defendant *could not amend* his Caſe: "for the Plea would ſtand; and after the Formality of a "Demurrer, the Court muſt give Judgment upon the "Goodneſs or Badneſs of it." And Ld. Ch. Ch. Juſt. *Pratt* went on, and compared it to an ill Juſtification in Treſpaſs, (where *no* Form of Words would have made it a Defence;) And therefore was of Opinion that as the Plea was ill, and contained no Title to the Franchiſe, the Court might give Judgment upon it, as confeſſing an Uſurpation. [*V.* 1 *Strange* 398.]

Now *here*, ſuppoſing (as I ſaid before) the ſwearing to be the *only* Iſſue; is it not a Queſtion totally *inconcluſive*, "whether he was, or was not ſworn before THESE *Perſons?*" Does it at all *conclude* to the real QUESTION? Is not this, mariſeſtly, a *Slip?* Does it not *appear* that this Plea † COULD *have been mended?* Certainly, it COULD; *viz.* by Pleading the Swearing-in, to have been *agreeable to the Statute* of 11 *G.* 1. [*c.* 4. *ſ.* 4. which directs it to be before the ‡ preſiding Officer.] Therefore, the REAL *Juſtice* of the Caſe is, That this *Slip* ſhould *not* be fatal *for ever.*

† N. B. This Plea ſeems to have been good in Form; but inſufficient, as to Fact.

‡ See Forteſcue's Diſtinction in 1 Strange 398. ‡ *Vide* Rex v. Charles Malden, B. R. 11th *November*, 1767. poſt. p. 2130.

This is a Franchiſe of great Importance. It is ſo, in *itſelf:* And, beſides, the Rights and Privileges of *many other* Perſons do depend upon it. And theſe Writs of *Mandamus* iſſuing purſuant to this Act were intended for the *ſettling* and *preſerving* of Corporations

IF this was the *ſingle* Iſſue, I think they would be *clearly intitled*, in this Caſe, to a *Repleader*. Yet

Secondly—It is objected "that here are *many other Iſſues*, "*all found for the Crown*, as well as this."

But the Iſſue juſt now ſpoken of as immaterial and void is an Iſſue taken upon an eſſential Part of an *entire* Defence: For the Defence here pleaded by the Defendant is *One entire* Defence; notwithſtanding that the Crown is at Liberty to take diſtinct Iſſues upon the diſtinct *Parts* of it. And therefore it would be abſurd and inconſiſtent, that the Finding againſt the Defendant upon the *other* Iſſues, the other *Parts* of *One entire* Defence, ſhould ſtand; in caſe we ſhould grant a Repleader upon, or an Amendment of *this* Part: For, if that ſhould be permitted, the Finding would ſtill be *againſt* the Title of the Defendant, it being ſet up and pleaded as *One entire* Title.

I agree that if it appeared upon the whole Record, "that "the Defendant was NOT duly elected," it would be as Ld. Ch. Juſt. *Pratt* ſays, a vain and idle Thing to grant a Repleader.

But

* But if the reſt of the Iſſues are only *Parts* of, and *depend-ant* upon the WHOLE TITLE; the ſame Reaſon does not then hold. ‡ P. 304.

The Way to do *complete* Juſtice indeed, is to let in the *one* Side, without prejudicing the *other*.

If a *Repleader* was to be granted, (upon the Suppoſition of this being the *only* Iſſue,) it muſt be † WITHOUT *Coſts*. But as this was a *Miſtake* of the *Defendant*; (in which the *Proſecutor* was *not* to blame,) We ought to do the moſt complete Juſtice We can, between Both. † V. 6 Mod. 2. 5th Point, accord.

My Ld. Ch. Baron was right in his Opinion, "that He "could not admit Proof *different* from the Iſſue joined;" And alſo "that this Iſſue was *connected* with the others."

If ſo, the Verdicts were *without Evidence*: And it was agreed "that they were to be *without* PREJUDICE." Therefore ſuch Verdicts ought to be ſet aſide, *as* without Evidence; and not to conclude againſt the Defendant, which *would be* a *Prejudice*.

Therefore He propoſed to ſet aſide theſe whole Verdicts, on *Payment of Coſts*; and to give the Defendant Leave to *amend* his Plea.

If it had been upon a *Demurrer* (which there might have been) the Court *would have given Leave to* AMEND.

This ſeems to be the true Way to come at Juſtice; and what We therefore ought to do: For the true Text is "*boni* "*Judicis eſt, ampliare* JUSTITIAM; (not "*Juriſdictionem*," as it has been often cited.)

This is what I would *wiſh* to do, if We *can* do it.

Mr. Juſt. DENISON—

Formerly, Verdicts were not uſed to be ſet aſide; And therefore, at that Time, Repleaders uſed very commonly to be granted. But they have been leſs uſual of late, ſince the Practice of ſetting aſide Verdicts has prevailed.

On Repleaders the Iſſue was conſidered as void; and the Verdict too; and conſequently, the Judgment was, "to *replead*."

An Information in Nature of a *Quo Warranto* does not differ from *other* Caſes.

*P. 305. * Here is an *entire Plea.* The Replication *ſeparates* it, and takes Iſſue on different *Parts* of it. The Replication *ought* to have *demurred* to this *immaterial* Part of the Plea: But *Iſſue* is joined upon it; And there is a Verdict upon it in the Negative, *viz.* "That the Defendant was *not* ſo ſworn as "he has pleaded." What can the *Court* do? The Iſſue and Verdict are *impertinent* and *void.* How then can the Court give *Judgment,* when it *does not appear* whether the Defendant had a Right, OR NOT? (I ſpeak now upon this ſingle Iſſue *only.*)

Well then, if you ſet aſide any *Part* of the Verdict, You muſt ſet aſide the *Whole.*

And this uſed, formerly, to be *one* Iſſue.

I well remember that Caſe of *Rex* v. *Philips, M.* 7 *G.* 1. It went upon an Uſage to hold over. The Point was Whether a Repleader ſhould be granted, when the Caſe could not be varied: And it was holden, that that would have been vain and idle. On the contrary, it was ſaid that it would be a different Thing, if the Caſe could have been *mended* upon a Repleader. I don't doubt but that there were great Numbers of *other* Iſſues in that Caſe, as well as in this: And yet a Repleader *would have been there granted* if the Caſe could have been *mended,* on the Uſage.

The *Whole* muſt be ſet aſide, *if Part* is ſet aſide.

It is ſaid "that this is a DEFECTIVE *Title.*"

But it is NO *Title at all*: It is *only one Link* of the whole Chain.

I think We may ſet aſide the *whole* Verdict upon *one* of the Iſſues being void. And this is better than granting a *Repleader*: Upon which a Writ of Error may be brought, and may long depend; which will be a much greater Delay of Juſtice.

Mr. Juſt. FOSTER—

This was an Election under a *Mandamus,* upon the Statute of 11 *G.* 1. in order to ſettle the Peace of the Burrough.

Here are 12 *Iſſues* joined, *All* found for the King; and *without Evidence,* on any of them: So that none of them have been yet *really* tried.

It is agreed "that in caſe of a *ſingle* Iſſue which doth not "determine the Right, (which way ſoever found,) a Re-"pleader may be granted."

The

* The 9th Iſſue, in this Caſe, falls directly within this Rule. It is totally immaterial to the Queſtion of Right. * P. 306.

If therefore the Verdicts on the other Iſſues, *upon which no Evidence was given*, vary the Caſe and ſtand in the Way of a Repleader, they ought to be *All* ſet aſide: Or otherwiſe complete Juſtice cannot be done.

And I think, as this Caſe is circumſtanced, the Agreement mentioned by the Lord Chief Baron, ¶ "that the "Verdicts were to be without Prejudice in any *future* "*Trial*," may without a Strain be extended to any *future Litigation* in the Cauſe. ¶ V. ante, 294.

Lord MANSFIELD—

I am now fully ſatisfied, by what my Brothers have ſaid, that the *whole Verdict* may be *ſet aſide*, on *Payment* of *Coſts*, and with *Liberty to amend the Plea*.

But that muſt be upon a particular Motion.

And I have no Doubt but that We may do this, WITHOUT *the Conſent* of the Proſecutors.

Which Motions (to ſet aſide the Verdict, on Payment of Coſts; and, to amend the Plea, on Payment of Coſts;) were accordingly afterwards made by Mr. *Norton*; and granted, after a faint Attempt by Mr. Serjeant *Poole* to ſhew Cauſe, and then to get Coſts as between Client and Attorney; in both which Attempts, he was unſucceſsful: For the Rules were both of them made abſolute, upon Payment of Common Coſts; obliging the Defendant, however, to take ſhort Notice of Trial.

Rex *verſ.* Inhabitants of Fremington.

No. 133. Friday, 13th May 1757.

(Lord Commiſſioner Wilmot *abſent.)*

See this CASE abridged in the TABLE; and at large in the Quarto-Edition of my SETTLEMENT-Caſes, N°. 133. p. 416.

* P. 307. No. 134. Saturday, 14th May 1757.

* Rex *verſ.* Inhabitants of Alton.

(*Lord Commiſſioner* Wilmot abſent.)

See this CASE abridged in the TABLE; and at large in the Quarto-Edition of my SETTLEMENT CASES, No. 134. p. 418.

† P. 314.

† Paxton *verſ.* Knight.

MR. *Norton* ſhewed Cauſe againſt a Prohibition.

This was a Queſtion whether a Prohibition ſhould be granted, to ſtay Proceedings in an Eccleſiaſtical Court, in a Suit by a Quaker, for a ſeat in a Church; founding his Title upon a *preſcriptive* Right: In which Suit the Eccleſiaſtical Court *had determined* againſt him. And he now came, after Sentence below, for a Prohibition. Note—An *Immemorial Preſcription* was alledged on *both* Sides.

Mr. *Norton*—againſt the Prohibition, cited 2 Ld. *Raym.* 755. the Caſe of *Jacob* v. *Dallow.* 2 *Salk.* 551. S. C. 5 *Mod.* 436. S. C. Caſes in *B. R.* temp. *W.* 3. 233. S. C. *Farreſley* 8. S. C.

‡ Page 315. ‡ As to Prohibition *after Sentence*——

Hetley 92. the Caſe of *Eaton* v. *Ayliffe* (which had been cited on the other Side,) is a Caſe to which the Court will not pay great Attention: It was determined *temp.* C. 1. and is a looſe Note: And even ¶ Mr. *Watſon* in his *Complete Incumbent* treats it as a Caſe of no Authority.

¶ Mr. Juſt. Deniſon obſerved, that the Complete Incumbent was not written by Watſon, but by Mr. Place of York.

The Court will not, *after Sentence*, grant a Prohibition, unleſs the Defect of Juriſdiction appears upon the *Face of the Libel.*

1 *Strange* 187. the Caſe of *Argyle* v. *Hunt*—is expreſsly ſo, in Point. And the Caſe of *Stone* v. *Fowler*, *Mich.* 9 *Annæ*—there cited [Fo. 188.] is to the ſame Effect. 1 Ld. *Raym.* 436. is alſo in Point: The Church-Wardens of *Market Boſworth* v. the Rector of *Market Boſworth*; where the Spiritual Court had adjudged *againſt* the Cuſtom ſet up; though their Law allows a *leſs* Time than the Common Law, to make a Cuſtom: But the Prohibition was denied. So here, if the Spiritual Court will admit *leſs* Evidence of a Preſcription,

ſcription, than the temporal Courts will; and the Preſcription is *nevertheleſs* found to be groundleſs; it is certain that the Party *who ſets it up*, can have no Reaſon to come for a Prohibition, *after Sentence*. ‡ And his only Reaſon for it can be, (as the Court obſerved in the laſt cited Caſe,) to *get clear* of thoſe *Coſts*, which he has by his own *vexatious Suit*, rendered himſelf liable to; And which (as was there adjudged) he ought to pay.

‡ V. Full v. Hutchins, pa. 1776. poſt. pa.

But THE COURT ſeemed to think that *if* the *Sentence* of the Eccleſiaſtical Court was a *Nullity*, their Award of *Coſts* muſt be ſo too. And here are *reciprocal Preſcriptions* alledged: And the Preſcriptive Right of the One is determined *for*; though that of the Other is determined *againſt*. They have adjudged the Adverſe Preſcription to be a *good* One: Which they could not try; and which they will eſtabliſh upon leſs Evidence than the Common Law requires.

And *Lord Mansfield* ſaid, that though he was very ſorry that the Court were obliged to grant the Prohibition, (becauſe the Party applied for it, only to get rid of paying the Coſts occaſioned by his own vexatious Suit;) Yet He thought they could not avoid doing it.

Per Cur. Rule for a Prohibition made *abſolute*.

* Rex *verſ.* Joſeph Chaplin Hankey, Eſq;

(*Lord Commiſſioner* Wilmot *abſent*.)

* Page 316. Monday, 18th May, 1757.

ONE *Ralph Carr* an Attorney, applied for an *Information* againſt the Defendant, for ſending him a *Challenge*.

Upon hearing the Affidavits, and the Letters that paſſed between theſe two Gentlemen, the Court thought that *Carr* himſelf appeared to have ſent the *firſt* Challenge to the Other; at leaſt, that his Letters manifeſtly *imported* a Challenge: Which the other clearly ſo underſtood, and accordingly accepted, and propoſed to fight with Piſtols.

The COURT held, that though the Defendant had *behaved very improperly*; And though it would have been right for the Court to have granted even CROSS-*Informations*, in caſe Each Party had applied for an Information againſt the other; Yet they thought that when the *Aggreſſor*, who gave the firſt Challenge, came and applied for an Information againſt the Other who *only accepted* it, (however improperly and unlawfully;) it was a very different Caſe; And that the

the Court had no reaſon to give him this EXTRAORDINARY Remedy, by way of Information: But ought rather to leave Him to his ORDINARY *Remedy*, by Action or by Indictment.

Therefore the RULE "to ſhew Cauſe why an Information "ſhould not be granted," was DISCHARGED.

Robinſon *verſ.* Raley.

Tr. 25 *G.* 2. *Rot'lo* 775.

THIS was an Action of Treſpaſs. The Declaration contained a great number of Counts; amongſt the Reſt, One in Treſpaſs for breaking and entering the Plaintiff's Cloſe; and depaſturing it with, &c. And for breaking and entering his Free-Warren: A 2d Count, to the like Effect; (but in different Years;) So a 3d, 4th, 5th and 6th; And 6 more, for breaking and entering another Cloſe called *Sands*'s *Piece*; a 13th for taking and carrying away the Plaintiff's Trees; and a 14th for taking and carrying away his Goods and Chattles.

† P. 317. † The Defendant had Leave to plead ſeveral Pleas: And accordingly He pleaded, 1ſt. The General Iſſue, to the whole. 2d Plea (by Leave, *ut ſupra*,) That as to the Cloſe called the *Rabbet-Walks*, "That it is one Rood of Land, Parcel of "a Common-Field; and that Mr. *Finch*, in Right of his pre-"bendal Eſtate, and all, &c. have Right of Common, &c. "in certain Fields called Middle Fields, whereof the Rabbet-"Walks are Parcel:" Which Rights he derives to Himſelf; and ſo juſtifies under it. The like Plea to the other 5 next Counts. He pleads, as to the 6 Iſſues relating to *Sands*'s *Piece*, the General Iſſue. To the 13th Count, He pleads Tenancy of another Cloſe, under the Plaintiff; and juſtifies under a *Licence*, and avers that it was uſed for Gates, &c. Another Plea was a Right of Common, &c. &c.

The Plaintiff, in his Replication to the 2d Plea to the 1ſt Count, traverſes the Right of Common: And in his Replication to the like Pleas as to the other five Counts, traverſes the Rabbet-Walks being Parcel of the Middle Fields. In his Replication to the laſt mentioned Plea, he traverſes the Right of Common. All theſe Iſſues were *found* for the Defendant. To the Plea of the 5th Count, the Replication traverſes "that the Cattle were the Defen-"dant's *own* Cattle; and that they were *levant et couchant* "upon the Premiſſes, *and commonable* Cattle." To this there is a ſpecial Demurrer for Cauſe, (*viz.* "that the Re-"plication

" plication is multifarious, and that ſeveral Matters, ſpe-
" cifying them, are put in Iſſue; whereas only *one ſingle*
" Matter ought to be ſo ;") and Joinder in Demurrer. To the Plea to the 13th Count, the Replication traverſes the *Licence*: (after proteſting " that the Tree was not uſed for " Gates &c. as is alledged by the Defendant's Plea.") And to this Replication alſo, the Defendant demurs ſpecially; and ſhews for Cauſe, " That it concludes to the " Country, whereas it ought to conclude with an Aver-
" ment."

Serjeant *Poole*, for the Defendant, complained of the Hardſhip the Plaintiff put upon the Defendant in the 5th Count, by inforcing the Defendant to prove the Cattle to be his *own* Cattle, *and commonable* Cattle; *and levant and couchant* upon the Land: Which hardſhip had *obliged* him to demur. 1ſt Demurrer.

He argued. that *ſome One* Fact only ought to be put in Iſſue; Not *Several.*

He cited *Co. Lit.* 126. *a.* [Letters q, r.] It muſt be One SINGLE certain material Point. And ſo alſo 8 *Rep.* 67. *b*, *Crogate's* Caſe [the laſt Reſolution,] lays down the Rule accordingly, " That an Iſſue ought to be full and SINGLE."

† Now here are *three* DISTINCT *Facts* put in Iſſue, by this Replication: Any One of which was ſufficient. † P. 318.

For if the Cattle were not his *own*, or were not *levant and couchant*, they were *not commonable* Cattle. The Plaintiff might as well have put Twenty Facts in Iſſue.

This therefore is, at leaſt, a Fault in *Form:* And we have demurred *ſpecially*, and ſhewn this for Cauſe; " That the " Replication is multifarious, and that *ſeveral* Matters are " put in Iſſue (ſpecifying them;) whereas *only One* SINGLE " Matter *ought* to be ſo."

As to the *Licence*—The Replication, (proteſting that the Tree was not uſed for Gates &c,) traverſes the Licence. To this Replication, We have demurred, *out of Neceſſity:* For though we really *have* a Licence, yet the Perſon who gave it to Us (the Plaintiff's Steward) has *denied* it; and We apprehend, would do ſo again, on Oath. Therefore We have demurred ſpecially, and ſhewn for Cauſe " That " the Replication concludes to the Country, whereas it ought " to conclude with an Averment." 2d Demurrer.

Now they ought to have traverſed the Licence ſpecially, and to have concluded with an Averment. *Crogate's* Caſe, 3d Reſolution, [*fo.* 67. *a. b.*] ſhews that this Licence ought

to

to have been ſpecially traverſed, and concluded with an Averment. And *Raſt.* 660. *b. bis.* 661, 630, 651. and 1 *Brown*, 353. and *Thompſon's Entr.* 365. And many other Precedents, are ſo.

Indeed where the *whole* of the Plea is traverſed, the Concluſion *may* be to the *Country*. But this is *not* a Traverſe of the *Whole*. So that this is a Departure (by Mr. *Robinſon*) from the common Form of Pleading.

Mr. *Yates contra* for the Plaintiff.

1ſt Demurrer. One Part of the Duplicity (*viz.* the Cattle not being *commonable*) is not pointed out by the Special Demurrer.

However, this Traverſe is *not double:* Though I agree that it *numerally* contains ſeveral Matters; all which TOGETHER make up the Defendant's Plea, and make *One* ENTIRE *Defence*. And it is within the Reaſon of *Crogate's* Caſe, 8 *Co.* 67.

Whereas *Duplicity* is, where diſtinct Matters, NOT being Part of *one entire Defence*, are put in Iſſue. For there are Caſes where *ſeveral Matters may* be put in One Traverſe: As, for Inſtance, a Cuſtom conſiſting of *ſeveral Parts.*

†Page 319. † Now all theſe Parts here traverſed, make *One entire Defence*. For the Cattle muſt be *commonable, levant and couchant, and* his *own:* Or elſe, it is no ſufficient Defence. To prove which, he cited *Ro.* 1 *Abr.* 398. Letter G. *Pl.* 2. 3. Letters H and I, throughout. 2 *Saund.* 227. The Caſe of *Stennel* v. *Hogg*, and 2 *Show.* 328. The Caſe of *Manneton* v. *Trevilian*, in Point.

2d Demurrer. As to the Licence, the Cauſe of Demurrer ſhews is, "that he ought to have maintained his Declaration; and "that he ought to have concluded with a Traverſe and "*Averment.*"

But Precedents are *both* ways. 2 *Brown's Entr.* 283. concludes as the preſent does. And whoever has ſeen the *whole* of this Record will not think that *either* of the Parties has concluded *too haſtily*. He cited the Caſe of *Clarke* v. *Glaſs*, *Tr.* 28, 29 *G.* 2. *B. R.* to prove that where the WHOLE *Contents* of the Plea are denied, the Concluſion muſt be to the *Country:* But where, only a *particular Fact* is denied, the Concluſion muſt be with an *Averment*. He alſo cited 2 *Lutw.* 1399, 1401. The Caſe of *Huſtler* v. *Raines.*

Serjeant *Poole*, in Reply—

1ſt.

1ſt. As to the two Matters making but one entire De- 1ſt Demur-
fence—Yet being *Variety of Facts*, they ought not *Both* to be rer.
put in Iſſue. *Crogate's* Caſe, 8 *Co.* 67.

And the common Method is, to traverſe " that the ſaid
" Cattle were *levant and couchant.*"

As to the Caſe of *Manneton* v. *Trevilian*, I agree that the *Cattle ought* to be *levant and couchant*. My Demurrer here is in Point of FORM ; and is ſpecial.

2dly. I do not know but the Party may go to Iſſue, in 2d Demur-
ſome Caſes : But I ſay this is not the *common* Form. rer.

The Caſe of *Huſtler* v. *Raines*, 2 *Lutw.* 1399, 1401. proves Nothing againſt Me.

LORD MANSFIELD held both theſe Demurrers to be frivolous.

The SUBSTANTIAL *Rules* of Pleading are founded in *ſtrong Senſe*, and the *ſoundeſt and cloſeſt Logic* ; and ſo appear, when well underſtood and explained : Though, by being *miſunderſtood* and *miſapplied*, they are often made uſe of as Inſtruments of Chicane.

‡ As to the preſent Caſe—'Tis true, You muſt take Iſſue ‡ Page 320.
upon a *ſingle* POINT : but it is not neceſſary that this ſingle *Point* ſhould conſiſt *only* of a ſingle FACT. Here the *Point* 1ſt Demur-
is, the Cattle being *intitled to Common :* This is the ſingle rer.
POINT of the Defence. But in *Fact*, they muſt be both his *own* Cattle, and ALSO *levant and couchant* ; which are *two different eſſential* Circumſtances, of their being intitled to Common ; and *Both* of them abſolutely requiſite.

So, as to the *Licence*—The Licence is the *Point* in Queſ- 2d Demur-
tion. And this Point in Queſtion, " Whether the Licence rer.
" was given, or not, is put in Iſſue : The *Whole* turns upon *this particular Propoſition.* Indeed it may be a different Caſe, where the *whole* of the Plea is NOT *denied* ; but *only ſome Parts* of it. But that is *not this* Caſe.

Mr. *Yates* has made right and reaſonable and intelligible Diſtinctions. And he has cited an expreſs Authority.

Mr. Juſt. DENISON concurred.

1ſt. As to *Crogate's* Caſe—The Replication " *de injuriâ* 1ſt Demur-
" *ſuâ propriâ abſq ; tali Cauſa,*" will do, in all Caſes where rer.
Matter

Matter of Title, and other Things of that kind, are not included in the "*abſq; tali Cauſa:*" And if you *admit* them, You may then plead "*De injuria ſuâ propriâ abſque* RESIDUO *Cauſæ;*" traverſing that Reſidue. But the Rule in *Crogate's* Caſe don't affect *this* Caſe. For here the Queſtion is *One ſingle Propoſition, viz.* the Meaſure of the Common: And the Meaſure of the Common is the Levancy and Couchancy jointly with the Property.

Skinner 137, is a more ſenſible Report of the Caſe of *Mollitn* and *Trevilian*, than 2 *Show.* 328. And there, the Levancy and Couchancy, *together with* the Property, were eſteemed to be the Meaſure of the Common; and *not* the Levancy and Couchancy *only*.

So that nothing more is here traverſed, than the Meaſure of the Common. The Caſe is in Point.

Beſides, I think it is *within Crogate's Caſe*.

2d Demurrer. As to the *Licence*—It is Right, and avoids the Prolixity of Pleading, The *old* Way indeed was otherwiſe: But it is altered, of late.

And He cited a Caſe (of an alternate Way of traverſing a corrupt Agreement,) which was in *M.* 5 *G.* 1. *B. R. Fen* v. *Alſton*—Where it was holden "That the Plaintiff has a ‡ P. 321. "‡ Liberty either to reply that the Bond was given upon another Account," and to traverſe the corrupt Agreement with an *Abſque Hoc*; *or* to deny the corrupt Agreement *directly*, and conclude to the *Country*. And the Caſe of *Baynham* v. *Matthews*, 2 *Strange* 871. goes upon the very ſame Foundation; and mentions the ſame Alternative.

v. Dunn v. Holt 2 Vol. 441.

Mr. Juſt. FOSTER. I am of the ſame Opinion.

Mr. *Norton*, who was alſo of Counſel for the Defendant, deſired the Court not to give Judgment yet; but to give them an Opportunity to move for Leave to withdraw their Demurrers and amend: Which the Court agreed to. And in a few Days afterwards, Mr. *Norton* moved for Leave to *withdraw* the two Demurrers, and plead to Iſſue; (upon Payment of Coſts:) And a RULE was thereupon granted to SHEW CAUSE.

And now Mr. *Yates* ſhewed Cauſe, for the Plaintiff againſt the Defendant's being at Liberty to withdraw the two Demurrers, and plead to Iſſue. And he cited 6 *Mod.* 102. The Caſe of *Croſs* v. *Bilſon*. 6 *Mod.* 1. The Caſe of *Staple* v. *Haydon*. 1 *Ld. Raym.* 668. The Caſe of *Fox* v. *Wilbraham*, and 2 *Strange* 1002. *The Bank of England* v. *Morrice*.

Serjeant

Serjeant *Poole* and Mr. *Norton contra* for the Defendant.—

The Merits have not been tried upon theſe Demurrers. We move this at *Common Law*; not under any Statute. And the Court are not bound down by any certain Rules. And they cited 2 *Saund.* 402. *Rex* v. *Ellames*, [2 *Strange* 976.] *Dutcheſs of Marlborough* v. *Widmore*, *Hil.* 4 *G.* 2. *B. R.* The Caſe of *Cope* v. *Marſhall*. *Tr.* 28 *G.* 2. *B. R.* [*V. ante* 259. S. C.]

The Caſe of *Giddins* v. *Giddins*, [*Tr.* 29. 30 *G.* 2. *B. R.*] was even after the Court had given their Opinion. §

§ It was after a Demurrer and Argument only; But the Court had given no Opinion: and the Rule was made abſolute without Defence.

And here is a Declaration of 20 *Counts*, manifeſtly intended to catch the Defendant, and to ſave Coſts.

If our Motion is granted, the *contingent* Damages aſſeſſed, will be out of the Caſe, and will be as none at all.

Lord Mansfield—It is admitted to have been done, *after a* Demurrer *and Argument:* But this is *after a* Trial; and *without any* favourable Circumſtances.

Now as no Caſe of ſuch an Amendment *after a* Trial is cited, I take it for granted that *None* exists.

† Theſe are frivolous Demurrers: And the only View of this Motion is *to get rid of the Coſts*. But the Plaintiff would have had his Coſts, if the Defendant had done right at firſt, and joined Iſſue upon theſe Facts; *if* they had been found *againſt* him. † P. 322.

So that here is neither Precedent, nor Reaſon for allowing this Motion.

Mr. Juſt. Denison concurred.

Where the Demurrer is firſt argued, *before* any Trial of the Iſſues, the Court will give Leave to *amend:* As in the Caſe of *Giddins* v. *Giddins*. But this is an Attempt to amend an Iſſue at *Law*, after *a Verdict* has been found on the Iſſues *upon* Facts, and *contingent Damages found* upon the Demurrers: Of which, there *never was an Inſtance*. And We do not know where it would end; Nor do I well know how the Cauſe *could* be again carried down to Trial.

If this had at firſt gone down to Iſſue; and had been found *againſt* the Defendant; It would have carried Coſts.

The

The Court cannot help ſeeing that this is upon RECORD: Here are *Verdicts* and *contingent Damages* found. Therefore We cannot help this: I wiſh We could; becauſe the Merit ſeems to be with the Defendant.

The Caſes of Amendment cited are where the Whole is ſuppoſed to be *in* PAPER; Or elſe the Court COULD NOT *have done it.* We have no Authority to do this, AFTER 'tis plainly upon RECORD.

Mr. Juſt. FOSTER concurred.

Per Cur' unanimouſly JUDGMENT for the PLAINTIFF upon the DEMURRERS.

‡ Page 323.

‡ Roberts *verſ.* Peake.

Tueſday 17th May 1757.

M. 29 *G.* 2. *Rot'lo* 625.

(Lord Commiſſioner Wilmot *abſent in Chancery.)*

THIS was a Special Caſe reſerved at *Niſi prius* at *Guildhall*, on a Trial there before the late Ld. Ch. J. *Ryder.*

It was an Action upon a *promiſſory Note*, brought by the Indorſee, againſt *One* Defendant only; though the Note imported, *upon the Face of it*, to have been made by *two* Perſons: And the Declaration was upon the Note, *as if it* had been an ABSOLUTE One, payable on the § Death of a Perſon named in it; Whereas it appeared upon the Face of it, to have been given *upon* two ſeveral CONDITIONS. For the Note, when given in Evidence, came out to be thus: "WE (naming the Defendant *Peake* AND *another Perſon*) "promiſe to pay to *A. B.* 116*l.* 11*s.* (Value received) *on* "*the* § *Death* of *George Henſhaw:* PROVIDED *He leaves* "*Either of Us ſufficient to pay* the ſaid Sum, OR *if we ſhall* "*be* OTHERWISE *able to pay it.*

§ V. ante 226. Goſs v. Nelſon, on a Note payable when Defendant ſhould come to Age; ſpecifying when that was to be.

Signed by PEAKE *only.*

And yet it was laid in the Declaration, merely as a Promiſſory Note abſolutely and in all Events payable on the Death of *G. H.*

Mr. *T. Clarke* of *Lincoln's-Inn—pro Quer.*

The

The Two Queſtions upon this Caſe are—

1. Whether this be a NEGOTIABLE *Note.*

2d. Whether *this* Note, given in Evidence, *ſupports* the *Declaration*; which is upon an ABSOLUTE Note payable on the Death of *G. H.*

Firſt Point—There can be no Doubt but that *if* the Note given in Evidence had *not* had the Proviſo added to it; but had merely been made payable *on the Death of George Henſhaw*; it had been a good negotiable Promiſſory Note, within the Statute of 3 & 4 *Ann. c.* 9. [§] 1.]

‡ For the *Contingency* of the *Death* of *G. H.* is *not* ſuch ‡ P. 324.
an uncertain Contingency, as that the Event may poſſibly or probably never happen; and *ſo* the Note might perhaps *never* become payable: But it is an *Event* CERTAIN *and* NECESSARY; and *no otherwiſe*, nor in any other Reſpect uncertain, than merely as to the *particular* TIME *when* it will happen. So that it is no more than the *ordinary* Caſe of a Promiſſory Note payable at a FUTURE Day.

And to prove this Doctrine, and that this is a negotiable Note, He cited 2 *Strange* 1217. the Caſe of *Cooke* v. *Coleham*, full in Point; being "to pay, &c, within Six Weeks "after the Defendant's Father's Death." 1 *Strange* 24. the Caſe of *Andrews* v. *Franklin*, ſtill ſtronger; being "to pay, "&c, within two Months after ſuch a *Ship ſhall be paid off.*"

Then as to the *Proviſo* or Condition, it is made *abſolutely* payable, on *George Henſhaw*'s Death, an Event which *will certainly happen:* Therefore the Proviſo is repugnant to the Body of the Note. And he endeavoured to ſhew a Reſemblance between this Caſe, and that in 2 *Salk.* 463. the Caſe of *Wells* v. *Treguſan*; and the Caſe in 21 *E.* 4. 36. and *Brooke*, Obligation 58. [S. C. abridged.]

Second Point—The Note produced in Evidence will ſupport the Declaration,

1ſt Objection is "That the Note is only laid, as the De-"fendant's *ſeveral* Note:" Whereas it imports upon the Face of it, to be made by *two* Perſons, jointly.

Anſwer. Perhaps One only *ſigned* it: Or if the Other did alſo ſign it, it was, nevertheleſs, equally the Note of the Defendant.

Defendant. It is laid, and muſt be pleaded according to its *legal* Operation. 1 *Strange* 76. the Caſe of *Butler* v. *Maliſſey* is moſt ſtrictly in Point.

2d Objection. " That this is laid AS *an* ABSOLUTE Note, " *without* mentioning the two Conditions," (of being payable) " IF he ſhall be able;" or " IF *Henſhaw* ſhall leave either " of them ſufficient to pay it."

Anſwer—But I ſay that this Note produced in Evidence, which contains theſe two Conditions, will ſufficiently ſupport the Declaration.

In attempting to ſupport this Aſſertion, he mentioned 6 *Mod.* 228. the Caſe of *Roberts* v. *Harnage*. 2 *Salk.* 659. S. C. 4 *E.* 4. 29. and 1 *Strange* 76. the Caſe of *Butler* v. *Maliſſey*, before mentioned.

‡P. 325. ‡ Mr. *Norton*, for the Defendant, was about to ſpeak: But

LORD MANSFIELD ſtopt Him, and ſaid, I fancy you will hardly argue this: (meaning that it was ſufficiently clear on Mr. *Norton*'s Side of the Queſtion.)

Mr. *Norton*—This was an Action brought by an Indorſee; and is under very particular Circumſtances.

I agree that a Note in the Name of two, and importing to be made by two Perſons, may be actually ſigned by One only and will be good: Alſo that a Note may be declared upon, according to its *legal* Operation.

As to the reſt—If the Court was clear, He ſaid He would not trouble them.

LORD MANSFIELD—I am very clear.

This Note was payable *upon a Contingency:* But it is NOT *an* ABSOLUTE Note. What would it ſignify, to have put in all theſe Contingencies, *if* the Party was *abſolutely* and *at* ALL *Events* bound to pay it upon the Death of *George Henſhaw?* Moſt manifeſtly, it was not intended that he ſhould be bound to pay it upon *George Henſhaw*'s Death, at *all Events.*

Therefore this is *not* a *negotiable* Note: For a Note payable *upon an uncertain Contingency*, is *not* a *negotiable* Note.

Mr. Juſt. DENISON concurred.

A Note

A Note payable *eventually* upon an uncertain Contingency can *never* be a *negotiable* Note. And if it had been ſo, yet there ought to have been an Averment " that *George Hen-* " *ſhaw did* leave One of them ſufficient to pay it ;" or that " the Defendant was otherwiſe able to pay it."

And indeed this ſhews plainly that it is *not* a negotiable Note within the Meaning of the Act of Parliament ; which means and intends an *abſolute* Note payable *at all Events.*

And I think too, that it is a *Variance* in the Declaration, from the Note itſelf, *for want of ſetting out* theſe Conditions : It ought to have been ſet out, as it *really* was.

† But indeed One of theſe Points depends upon the other : † P. 326.
And I think this Note is *only eventually* and *conditionally* payable, and by no Means *abſolutely* and at *all* Events.

Mr. Juſt. FOSTER concurred, both as to the *Variance* ; and alſo that it was *not* a *negotiable* Note as being payable *eventually*, and *not abſolutely.*

Per Cur. JUDGMENT for the DEFENDANT as upon a Nonſuit.

Denn, ex dimiſſ. Burges, Vid. *verſ.* Purvis et al'.

THIS was a Special Caſe, upon an Ejectment tried at *Maidſtone* Aſſizes, in *Auguſt* laſt.

Richard Burges, being ſeiſed in Fee Simple of divers *Gavelkind* Meſſuages, Lands, Tenements and Hereditaments in the ſeveral Pariſhes of *L. M. B. M.* and *H.* made his Will in Writing, on 15th *Feb.* 1735 : and thereby deviſed his ſaid Meſſuages, Lands, *&c*, to his Wife *Elizabeth* for her Life : with Remainder to his Brother *Thomas Burges*, in Tail Male ; with Remainder to *William Burges* (Son of his late Brother *John Burges*) in Tail Male : with Remainder to his own right Heirs for ever. And the ſaid *Richard Burges* died without Iſſue, and without revoking or altering his ſaid Will.

And the ſaid *Thomas Burges* and *William Burges* are ſince dead without Iſſue.

On 8th *September* 1746, the ſaid *Thomas Burges* made his Will : Whereby He deviſed All *his* real Eſtate in the ſeveral Pariſhes aforeſaid, to his Wife *Ann Burges*, for her Life.

On 6th *March* 1755, the ſaid *Elizabeth*, Widow of *Richard Burges*, died.

In *Eaſter* Term 29 *G.* 2. the ſaid *Ann Burges*, the Deviſee of the ſaid *Thomas B.* brought her Action of Ejectment, for a MOIETY of the above Gavelkind Lands and Premiſſes, UPON A SUPPOSITION " that her Teſtator *Thomas*, (as " the Brother of the ſaid *Richard*,) and *William B.* (as the " Nephew of the ſaid *Richard*,) *were the* ONLY *Heirs* of " the ſaid *Richard*, at the Time of his Deceaſe, according " to the Cuſtom of Gavelkind; and, *as ſuch, intitled* to the " real Eſtate of the ſaid *Richard in* MOIETIES."

‡ P. 327. ‡ On Trial of this Ejectment, it appeared, in the Courſe of the Evidence, " that the ſaid *Richard Burges*, at the " Time of his Deceaſe, left a *Niece* (named *Mary*) the *only* " *Child of* WILLIAM *Burges*, One OTHER *Brother* of the " Teſtator, who, by the Cuſtom of Gavelkind, was *intitled* " *as* Co-*Heir*, TOGETHER *with* the ſaid *Thomas* (the Bro- " ther) and *William* (the Nephew of the Teſtator,) to the " Premiſſes in Queſtion."

Whereupon, by Conſent of Parties, it was ordered by the Court, that a Verdict ſhould be given for the Plaintiff, *as to One third* Part of the Premiſſes in the Plaintiff's Declaration ſpecified; ſubject nevertheleſs to the Opinion of the Court of *King's Bench*, upon a Caſe to be ſtated upon *this Point—viz.*

" Whether the Plaintiff, *on her Declaration* FOR *a* MOI- " ETY of the Lands, Tenements and Hereditaments therein " mentioned, *can* RECOVER *One* THIRD *Part* of ſuch Pre- " miſſes."

Which Order of *Niſi prius* was afterwards regularly made a Rule of this Court.

And it came on now, in the Special Paper, to be argued.

Mr. *Knowler*, being Counſel for the Plaintiff, argued—

That the Leſſor of the Plaintiff muſt recover ACCORDING *to his Title.*

And this is ſo, Whether the Ejectment be brought for an undivided, or a ſeveral and divided Part; for the *whole*, or for *Part* of a Thing; for an Entierty, or for a Moiety.

In *Plowd.* 420, 424. *b. Bracebridge*'s Caſe—the Reporter blames Himſelf for not having objected to the Verdict.

But

But 3 *Bulſt.* 184. the Caſe of *Cowper* v. *Frankline*, and many other Caſes explode *Plowden*'s Notion "that the Ver-"dict was liable to Objection upon that Account."

Here, the Declaration is for *One* undivided Part; and the Verdict, for *another* undivided Part. Which is *not an immaterial Variance* from the Declaration, ſufficient to prevent the Plaintiff's having Judgment.

For there is no Neceſſity that the Verdict ſhould agree *preciſely* with the Declaration. All that is neceſſary is that the Thing, for which the Verdict is given, ſhould be *comprized in*, and be *Part of* the *Thing demanded* by the Declaration.

† And it could be upon *no other Foundation*, that the Caſe was determined, which is mentioned in 2 *Ro. Abr.* Tit. *Trial*, *fo.* 704. *pl.* 22: Where an Ejectment was brought of *a* Meſſuage; And it appeared in Evidence, and was ſo found by the Verdict, "That only a *ſmall Part* of the Meſſuage "was built by Incroachment on the Leſſor's Land; *not* the "Reſidue; and yet the Plaintiff had Judgment." † P. 328.

Here, the Declaration is for a *Moiety*; to which it was then ſuppoſed that the Leſſor of the Plaintiff had a Right, as Deviſee of One of *two* Brothers of the Teſtator. Indeed it came out upon Evidence, that the Teſtator really left *three* Brothers and Co-heirs: So that the Leſſor of the Plaintiff had in Fact a Title to a *third* Part only. And the Verdict is accordingly, for a *Third*.

But the *Moiety* INCLUDES the *One Third*. So that what is recovered by the Verdict, being *contained in*, and being *leſs than* what is demanded in the Declaration, this Caſe muſt be ruled by the Ground I have already mentioned, "that the "Leſſor ſhall recover ACCORDING TO *his Title*." And in Point to prove this, is the Caſe in 1 *Siderf.* 229, of *Ablett*, *Leſſee of Glenham*, v. *Skinner*: Where the *Declaration* was of a *fourth Part* of a fifth Part; And the Leſſor's true *Title* was only to $\frac{1}{3}$ *of* $\frac{1}{4}$ of a fifth Part; (which was ONLY A THIRD *Part of what was demanded*:) Yet it was reſolved "that the "Verdict ſhould be taken *according to* the Title."

Mr. *Burrell*, for the Defendant, premiſed that this was a hard Caſe; and therefore deſerved Favour, and juſtified the Defendant's inſiſting on all legal Objections. Then He urged that the Plaintiff muſt ſhew a clear Title to make *ſuch* a Leaſe as is confeſſed by the Defendant: And, as he *knows his own Title*, he ought to ſet it forth AS *it is*.

In the Caſe of *Berington ex dimiſſ. Dormer* v. *Parkhurſt*; 10 *G.* 2. *B. R.* and in *Dom. Proc. May* 1738. *H.* 11 *G.* 2. The Court held that the Plaintiff could not recover; becauſe the Demiſe was laid before the Time of Actual Entry; And the Leaſe was holden void in its Creation.

And if the Leaſe is laid *à Die Datûs*, it will not ſupport an Entry *upon* the Day.

Two Tenants in Common cannot declare upon a joint Leaſe. So is *Cro. Jac.* 166. The Caſe of *Mantle* v. *Wollington*.

1 P. 329. ‡ *Comberb.* 190. in the Caſe of *Moore* v. *Pardon*, One *Habendum* to two Demiſes, was indeed holden well enough, on Error brought.

3 *Lev.* 334, 335. The Caſe of *Goodwin* v. *Blackman*, was an Ejectment of the tenth Part of a Meſſuage deſcribed as being in *two* Pariſhes; whereas the whole lay in *One* of them only: It was Holden that the Evidence did not maintain the Declaration; which was preciſely, of the tenth Part of an entire Thing.

Hardres 330. In the Caſe of *Wheeler* v. *Toulſon*, The Court inclined that a Demiſe *de Herbagio et Pannagio*, did not maintain a Declaration for the *Land*.

And he ſuppoſed there might be a Difference between Treſpaſs, and Ejectment: And concluded with praying a Rule for a Non-Suit.

Mr. *Knowler* in Reply—Here, the Plaintiff's Title was *not* known to Her: For She ſuppoſed *only two* Brothers; And it comes out that there was a *third*.

And the Queſtion is Whether She can recover under *this* Title.

The Plaintiff here ſtands in the Place of a Coparcener: And therefore She may bring her Action for *her Part, by Herſelf*.

The Caſe of *Ablett* v. *Skinner*, in 1 *Sid.* 229, is in Point: 'Tis the very Caſe, as to the Recovery being *leſs* than the Demand.

Therefore he prayed that the Plaintiff might be at Liberty to enter up Judgment on this Verdict.

Lord

LORD MANSFIELD—

This is an exceeding plain Caſe. The Rule is undoubtedly right, "That the Plaintiff muſt recover *according to* "*the Title.*" Here, She has *demanded* HALF; And She appears *intitled to a* THIRD: And ſo much ſhe ought to recover.

Mr. *Knowler's* Principles, and his Authorities are Both right: And the Caſe of *Ablett* v. *Skinner*, which He cites from 1 *Siderf.* 229. is in Point.

And ſo if You demand 40 Acres, You may certainly recover 20: Every Day's Experience proves this.

* And ſo it is, in an Aſſiſe: *Part* may be recovered, on a Demand for the *Whole*. And no poſſible Objection can be made to this. For if MORE is laid, there is no Reaſon, why he ſhould not recover LESS: Though the *Reverſe* indeed will not hold; *viz.* That if he *demands leſs*, he ſhall nevertheleſs be intitled to *recover more*. * P. 330.

Mr. Juſt. DENISON concurred—And ſaid, He thought the Caſe of *Goodwin* v. *Blackman*, cited by Mr. *Burrell* out of 3 *Lev.* 334, 335. was a ſtrange Caſe. And the Caſe therein cited, (*p.* 355.) 44 *Aſſiſe* 27, of an Aſſize of a *Mill*, and a Recovery of only *Part* of it is a ſtrong Caſe § againſt it. And that principal Caſe reported in 3 *Lev.* 334. is contrary to all Experience. And *Levinz* there cited ſeveral good Caſes, on Behalf of the Plaintiff; which the Court did not deny.

§ It is put as ſuch, by the Reporter; who makes a Quære, as to the Authority of the principal Caſe, and cites this old Caſe in order to invalidate the Court's Determination.

Mr. Juſt. FOSTER concurred, And ſaid the Caſe in *Siderfin* was in Point. [1 *Siderf.* 229.]

Per Cur. unanimouſly.

Let the *Poſtea* be delivered to the Plaintiff, in order to enter up JUDGMENT for the PLAINTIFF.

Whiſkard,

Whiſkard, Aſſignee &c, *verſ.* Wilder.

A Demurrer to a *Declaration* on a *Bail-Bond.*

Mr. *Whitaker*, for the Defendant, Objected that the Declaration ought to have particularly *ſet forth* "that the Debt "was *ſworn to* by the Plaintiff; and that the Sum *ſworn to* "be due, and for which the Defendant was holden to bail, "was *marked* on the Writ." For he alledged that without ſhewing this, here was NO SUFFICIENT *Authority to* ARREST the Defendant: And conſequently the Bail-Bond is *no good*, ſince the Act of 12 *G.* 1. *c.* 29; but *void.* And he cited 1 *Strange* 399. The Caſe of *Mills* v. *Bond:* Where the original Proceſs was returnable at a Day out of Term: And it was therefore holden a *void* Proceſs.

Now here it is not ſhewn, "That the Debt was to the "amount of 10*l.*" nor is the Sum due ſworn to, or the Writ marked: All which are *eſſentially* requiſite, by the ſaid Act of 12 *G.* 1. *c.* 29. Sections 1 & 2.

§ P. 331: § Serjeant *Poole*, for the Plaintiff, argued *è contra*, That the Declaration is good, in its preſent Form.

It is an Action brought by an Aſſignee of a Bail-Bond; Which he *properly* ſets forth; and then ſhews the Bond to be forfeited: Which is the *whole* that is neceſſary for the Plaintiff to ſhew.

And if the *Sheriff* has holden the Defendant to Bail, when he ought not, or improperly; the Remedy of the Defendant for that, is *againſt* the *Sheriff*; but the *Bond* itſelf is *good*, and not void; (however voidable it might poſſibly be by Plea.)

And he ſaid he would mention a very late Caſe, in Proof of his Poſition: Which Caſe was, by Name *Nordon* v. *Horſley*, dererminded laſt Week, in *C. B.* It was an Action on a Bail-Bond, taken for *more* than the Sum *ſworn to*; And this Statute of 12 *G.* 1. was pleaded: But the Court held the Statute to be *only directory*; and over-ruled the Plea.

Nor is it USUAL to inſert this in the Declaration.

Mr. Juſt. DENISON—It is *often* done, and *often* not: I have often ſeen Declarations of BOTH Sorts; ſome, one way; ſome, the other.

Mr.

Mr. *Whitaker*, in Reply. My Objection is, " That there " is *not a ſufficient Authority* ſet forth, for *the Sheriff to* ARREST the Defendant." And there is no need to *plead* this: For it is a *void* Bond.

3 *Lev.* 74. The Caſe of *Graham* v. *Crawſhaw*, proves the Bond taken upon an impoſſible Condition, to be contrary to the Statute of *H.* 6. (23 *H.* 6. *c.* 10.) and to be *void* by it.

And ſo, *this* Bond alſo appears, upon the Face of the Declaration to be a *void* Bond, as being contrary to the Statute.

And 12 *G.* 1. makes this Circumſtance *eſſential* to conſtitute a *legal* Proceſs; and muſt have Reference to the Statute of the 23d of *Henry* 6th.

And this is not like the Caſe of *Nordon* v. *Horſley* in *C. B*: Where the Bail-Bond was only taken for a *greater* Sum.

Here, the Arreſt was *void*: And conſequently, the Bail-Bond was *void*, too.

§ LORD MANSFIELD—This has not been thought neceſſary to be ſet forth, till this Time, ever ſince the making of the Act of 12 *G.* 1. *Nor* does it, upon Reading the Act, appear to be an ESSENTIAL Requiſite to *the Validity of the* Bail-Bond, nor in the Nature of a *Condition precedent* to it: But on the contrary, the Statute of 12 *G.* 1. appears to be *only* DIRECTORY to the Sheriff. So that though the *Sheriff may be Himſelf anſwerable* for ſuch an Omiſſion, yet the *Bond* is NOT VOID. § P. 332.

And I think, it is *properly likened* to the Caſe of taking Bail for a larger Sum.

In *both* theſe Caſes, the *Sheriff*, (or perhaps the Plaintiff,) may be anſwerable or puniſhable: but the *Bond* is *not* VOID.

Mr. Juſt. DENISON concurred—He ſeemed to wonder that this Point had never yet been determined.

He thought the Plaintiff was *not*, in Point of Law, *obliged* to ſet this out, in order to entitle him to his Action: Though it certainly *has been often done, pro majori Cautela.*

The Original Action appears to have been an *Acetion* for 50 *l.* And a good Precept is ſet out. Therefore the Defendant *was liable to be arreſted.* And it is ſet out " that " he *was arreſted.*" This Act of 12 *G.* 1. does *not* make the Proceedings *void*, in Caſe the Defendant be arreſted *without*

without Affidavit and *marking* the Sum ſworn to, upon the Back of the Writ: It *only* PROHIBITS the Sheriff and Plaintiff from doing it. And they may indeed be liable to an Action *upon the Caſe* for it; (though perhaps not to an Action of *Treſpaſs*:) But it does *not* make the *Bail-Bond* VOID.

Therefore I think there *is enough* ſet out, in the Declaration to maintain this Action of Debt upon the Bond.

Mr. Juſt. FOSTER concurred. The Act of 12 G. 1. is *only directory*: It does *not* make the Proceſs *void*. And as this Objection has never been taken *before*, from the Time when the Act of Parliament was made; I think it ought to be diſcouraged *now*, (after upwards of 30 Years.)

And *if* the Fact was ſo, "That there *was no* Affidavit," the Defendant might have been relieved in a *much eaſier* Method; by applying to the Court, or to a Judge to be diſcharged upon *Common Bail*.

Per. Cur. unanimouſly,
JUDGMENT was given for the PLAINTIFF.

‡ P. 333. Wedneſday 18th May 1757.

‡ Henry Earl of Carliſle *verſ.* Armſtrong et al'.

(Lord Commiſſioner Wilmot *abſent.)*

THIS was a Trial at Bar on the Civil Side of the Court.

Three Queſtions were to be hereby tried.

1ſt. Whether, upon the Death or Alienation of the Tenants of the Barony of *Gilleſland in Cumberland*, *a reaſonable* ARBITRARY *Fine at the* WILL *of the Lord*, be payable to the Lord, or not.

2d. Whether the Tenants have Liberty to let for three Years, or mortgage, *without Licence* of the Lord, and *without paying* any Fine at all.

3d, Whether they had Liberty to *exchange*, &c, *without* Licence or Fine.

But the Defendant's Counſel ſaid they did not intend to inſiſt on the 2d. Queſtion, ſo that the firſt and third only remained in Diſpute.

About

About Six in the Afternoon this Trial ended in a VERDICT for the PLAINTIFF, upon all the three Iſſues.

Rex *verſ.* White and Ward. Friday 20th May 1757.

THE Defendants had been convicted of a NUSANCE in erecting and continuing their Works at *Twickenham*, for making acid Spirit of Sulphur, Oil of Vitriol, and Oil of *Aqua fortis*. The Indictment ran thus, *viz.* That " at the PARISH of *Twickenham*, &c, *near* the King's " Common Highway there, and *near* the Dwelling Houſes " of ſeveral of the Inhabitants, the Defendants erected " 20 Buildings for making noiſome ſtinking and offenſive " Liquors; and then and there made Fires of Sea-Coal and " other Things which ſent forth Abundance of *noiſome of-* " *fenſive* and *ſtinking* Smoke; and made, &c, great Quan- " tities of *noiſome offenſive ſtinking* Liquors, called, &c; " whereby and by reaſon of which noiſome offenſive and " ſtinking, &c, the *Air was impregnated with noiſome and* " *offenſive Stinks and Smells*; to the common Nuſance of " all the King's Liege Subjects *inhabiting*, &c. and travel- " ling and paſſing *the ſaid* King's Common Highway; and " againſt the Peace, &c.

* Sir *Richard Lloyd*—for the Defendants—(on *Monday* 15th *November* 1756,) would have moved a *mixed* Motion; *viz.* both for a *new Trial*, and *alſo* in *Arreſt of Judgment*; or, at leaſt, in Arreſt of Judgment *firſt*, and for a new Trial *afterwards*. But * P. 334.

THE COURT held, that neither of theſe Methods, could conſiſt with the GENERAL RULE *of the Court*, or with a *particular Rule* made in this Caſe, to give them Leave to move *either* of theſe Motions on this Day, though the 4 Days given upon the *Poſtea* were expired. Whereupon Sir *Richard* was obliged to begin with the Motion for a *new Trial*. And He ſaid that this Indictment was laid for making a Liquor, from whence the Air was impregnated with *noxious*, *hurtful*, *unwholeſome*, and ſtinking Qualities: And the *Engliſh* Word " *noxious*" anſwers to the *Latin* " *nocivus*." But it appeared, He ſaid, *upon the Evidence*, that the Fumes, however offenſive and diſagreeable to many Perſons, were by no Means in reality *noxious*, *hurtful* or *unwholeſome*; but the *contrary*.

Rule to ſhew Cauſe: With this Addition,—" That the " Defendants ſhould have 3 Days Time to move in Ar- " reſt of Judgment; *after* the Court ſhall have given " their Opinion upon the *preſent* Motion, for a new Trial, " as upon a Verdict AGAINST *Evidence*."

On

On *Tueſday* the 23d of the ſame Month, Mr. Juſt. DENISON reported the Evidence; which was of great Length, He ſaid, there being about 75 Witneſſes on each Side: However he collected the *Subſtance* of it together in his Report. It appeared to be very ſtrong on the Part of the Proſecution: And he declared himſelf *ſatisfied* with the Verdict. And it appeared upon his Report, that the Smell was not only *intolerably* offenſive, but alſo *noxious* and *hurtful*, and made many Perſons ſick, and gave them *Head-Achs*.

Mr. Juſt. FOSTER ſaid that "*Noiſome*" "and *Noxious*," were ſynonimous Terms; and that there was no other *Latin* Word for "*noxious*," but "*nocivus*."

The *Rule* was therefore DISCHARGED, as to *Setting aſide* the *Verdict*.

On the *Saturday* following, Sir *Richard Lloyd*, Mr. *Norton*, Mr. Serjeant *Hewitt*, and Mr. *Nares*, moved in *Arreſt* of Judgment; (which was not yet ſigned.) They objected to the *Indictment*; It being laid *generally*, at the PARISH of *Twickenham*; and only ſaid "*near* the Common High-"way;" but not ſaid to be IN the *Town* or *Village*: It may be upon a Heath or Common, for aught that appears ‡ to the contrary. Though it appears by 2 *Ro. Abr.* 139. Title *Nuſance*, Letter *F. pl.* 2. *Rankett's* Caſe, that making Candles, even *in* a Vill, which cauſed a noiſome Scent to the Inhabitants, has been holden to be *no* Nuſance.

‡ P. 335.

But here, NO OFFENCE is *preciſely* laid. It charges "that "by reaſon of the noiſome offenſive and ſtinking Smoke, "the Air was impregnated with noiſome offenſive Stinks "and Smells:" which are vague uncertain Terms. As to "*noiſome*" V. *Minſhew*, and *Skinner's Etymologicon*.

Tremaine's Pl. Cr. 195. *Rex* v. *Brookes* (for keeping a Glaſshouſe) uſes the Words "*unwholeſome* and *dangerous*." *Ibid.* 198. *Rex* v. *Cole*, (for a Nuſance in keeping a Soap-boiler's Furnace,) "*unwholeſome*, turpibus, *periculoſiſſimis*, "*contagious* and *infectious*." Here, 'tis only ſaid to be "*noiſome and offenſive*." It ought to have been laid *preciſely and particularly*. † 2 *Hawk. P. C.* 184, 185, 186, "*Hurtful*" is alſo a vague Term: It ought to have been laid to be *Inſalubrious*.

† But all this relates only to indictments for Murder and manſlaughter; and does not concern Nuſances.

As to the vague Term, "*Near*," there was a Caſe of *Wilkes* v. *Broadbent*, *Paſch.* 1745. *B. R.* where a Cuſtom "to lay Rubbiſh *near* the Eye of a Coal-Pit" was held bad: though

though that was a *Civil* Suit, and the Cuſtom found by a Verdict. Much more, upon an *Indictment*. And this is a lawful Trade; and can *become* a Nuſance only by Accident, *viz.* by being ſo to a *Town* or *High-road*. It can be indictable only for being exerciſed in the *Heart* of a Town. For, according to 2 *Show.* 327. *Rex* v. *Pierce*, "Such Trades ought not to "be in the *principal* Parts of the City; but in the Out-Skirts." And the Court will *not here preſume* that this was in the Town. Beſides *Hurtfulneſs* is the *Giſt* of this Indictment. *Palm.* 198, 199.

Serjeant *Davy*, Mr. *Morton*, Mr. *Aſton*, Mr. *De Grey*, Mr. *Stow*, and Mr. *Thurlow*, *contra*, for the Proſecution, anſwered, that "*Noiſome*" conveys indeed a complex Idea; but ſtill *includes* "Hurtfulneſs." It ſtands in the Place of the Latin Word "*nocivus*," and certainly imports a Nuſance. 2 *Ro. Abr.* 139. Letter *F.* pl. 2. *Rankett*'s Caſe of a Tallow-Chandler is as it has been cited: But 1 *Hawk. P. C. Pa.* 199. *c.* 75. *ſ.* 10. *Wonders* at and diſputes that Determination.

"*Near*" is ſufficiently certain: and was as particular as the *Nature of the Thing* would admit: For it was not *equally* near to *all* the Houſes. And *after a Verdict*, it ſhall be *intended* to be *ſo* near as to be a Nuſance.

As to the Caſe of *Wilkes* v. *Broadbent*—A *Preſcription* muſt be certain: Beſides, that was laid too extenſive and arbitrary.†† But here, its being laid "at the *Pariſh* of *Twickenham*" is ſufficient. And in Fact, it is a very populous Place. ††Page 336.

They cited *Jacob Hall*'s Caſe, 1 *Mod.* 76: who had erected a Rope-Dancer's Stage at *Charing-Croſs*, *Per Hale*, Ch. Juſt. "It becomes a Nuſance to the *Pariſh*." That was the Foot he put it upon. And this Indictment of ours is laid extenſively enough to be a *Common* Nuſance, though not a *public* One: Nor did it, in Fact, affect *other* Perſons than thoſe living and paſſing *near* it.

Their Objections came too late, after Verdict: For it is a mere Matter of Evidence, "Whether it was noxious, or "not. And 'tis plain that the Defendants *underſtood* the Word "Noxious" in the Senſe of "Unwholeſome;" becauſe they defended themſelves upon *that* Foot, and examined many Witneſſes *about* the Unwholeſomeneſs of the Stench. In *Cro. Car.* 510. *Tohayle*'s Caſe, [there cited in the Caſe of *Morley* v. *Pragnell*,) Erecting a Tallow-Furnace croſs the Street of *Denmark* Houſe in the *Strand* was adjudged a Nuſance, and to be removed. Nay, an *offenſive* Stench is of itſelf a Nuſance;

ſance; even though it ſhould *not* be ſtrictly hurtful. An Indictment merely for a *Stench* would have been good; even *without any* Epithets. It depends upon *rendering the Property of other Perſons incommodious and uncomfortable* to them: And this Point is to be tried by a Jury, "Whether the Thing be "really *ſuch* a Prejudice or Incommodiouſneſs to the Neigh-"hourhood, as amounts to a Nuſance." And here the Jury have found it ſo.

And as to the *Place*—That alſo is Matter of Evidence. The *Court* cannot take Notice, *ex officio*, of the Boundaries of the Pariſh of *Twickenham*. It is the *Concourſe of People* that this Point muſt depend upon. And "*near*" is the ſtrongeſt Word that We could uſe, agreeable to the Circumſtances of this Caſe. And the Jury, who have examined it, have found for Us.

Sir *Richard Lloyd* in Reply—Aſſerted that the Epithet "*Offenſive*," alone, would not be ſufficient. And as to the Word "*near*," He obſerved that the Jury have not found *how* near it was. And the laying it generally "*in the Pariſh*" at large does not ſhew that it is a Fact indictable: For it might be at a vaſt Diſtance from any Houſe, or Place of Reſort.

LORD MANSFIELD thought there was nothing in the Objections: Which he ſaid, are reducible to 3 Heads; *viz.*

1ſt. That there is no ſufficient Charge of the *Hurtfulneſs*;

2dly. That it is not preciſely charged, "*to whom*" the Hurt is done;

* P. 337. * 3dly. That it is only laid *generally* "*in the* PARISH of "*Twickenham.*"

Firſt—The Jury have *found* "that *it is* to the *Common Nu-*"*ſance* of the King's Subjects dwelling, &c. and travelling, "&c."

And the Word "*noxious*" not only means "*hurtful and* "*offenſive to the Smell*;" but it is alſo the Tranſlation of the *very* TECHNICAL *Term* "*nocivus*;" and has been always uſed for it, ever ſince the Act for the Proceedings being in *Engliſh*.

But it is NOT *neceſſary* that the Smell ſhould be *unwholeſome*; It is enough, if it renders the *Enjoyment* of Life and Property *uncomfortable*.

Secondly—The *Perſons* incommoded are *ſufficiently* deſcribed: And the Offence is charged to be to the *Common* Nuſance

Nuſance of Perſons inhabiting and travelling *near*, &c. And unleſs they had been *ſo near* as to be hurt by it, the Indictment could *not* have been *proved*. Whereas in the Caſe of *Wilkes* and *Broadbent*, it was quite *uncertain how near*, the Rubbiſh might be laid.

Thirdly—It is *ſufficiently laid*, and in the accuſtomed Manner. The very *Exiſtence* of the Nuſance depends upon the Number of Houſes and Concourſe of People: And this is a *Matter* of *Fact*, to be judged of by the Jury. And in the very Caſes in *Tremaine* 195. of a Glaſshouſe, and 298. of a Soap-boiler's Furnace,—they are laid in *Pariſhes, apud Paroch'* &c." Therefore there is no Foundation for the Objections.

Mr. Juſt. DENISON—There is a *ſufficient legal Certainty* in this Indictment: So that the Defendants had an Opportunity of making a proper Defence at the Trial. 1ſt.

Upon a former Trial, the Indictment then before the Court charged the Air to be corrupted. *This* preſent Indictment is better expreſſed. The Word " *noxious*" includes the complex Idea, both of Inſalubrity and Offenſiveneſs. And there was no Need to ſpecify particular Inſtances of the Effects of it. There is nothing in this Objection. And it is alſo ſufficiently charged, *to whom* the Nuſance is done. 2dly.

As to the laying it in a *Pariſh*—It is likewiſe ſufficient. In the Caſe of the *King* v. *Blower*, *Hil.* 27 *G.* 2. *B. R.* The Court declared they would take the Vill and the Pariſh to be co-extenſive: And they held that there were *only* two Caſes † where it was neceſſary to *lay* a Vill; which were upon the Statute of Additions (where you are tied up to the Vill,) and in an Appeal of Death, upon the Statute of *Glouceſter*, *cap.* 9. The Deſcription of being " PROPE *altum viam re-* " *giam*," is the *Common* Method. And it is laid ad *commune* Nocumentum: And the Jury have *found it*, as it is laid. Therefore I think 'tis in legal Form. 3dly. † P. 338.

Mr. Juſt. FOSTER—The only Queſtion is " Whether the " Fact laid *implies* a Nuſance," I think it *does*. Otherwiſe, the mere *Laying* it to be " *ad commune Nocumentum*," would not perhaps help it. This is certainly a *Common* Nuſance. And " NEAR the Highway and Dwelling-houſes," is properly alledged, in order to ſhew it to be ſo. *V.* 1 *Strange* 686, 687. *Rex* v. *Pappineau*, *H.* 12 *G.* 1. *B. R.* in Point, accord. It never was objected that laying a Robbery " *in* or *near*" a ‡ Highway, is bad: No; 'Tis Matter of *Evidence*. 1ſt. 2dly. 3dly. ‡ V. 1 E. 6. c. 12. §. 10.

[Note—Mr. Juſtice *Wilmot* was abſent, in the Court of Chancery.]

So

So that the COURT were unanimous in *denying the Motion.*

Yet *N. B.* That (according to the uſual Courſe in like Caſes) *no Rule* at all was here taken in the Rule-Book: Only, the Counſel for the Defendants *took nothing by their Motion* in Arreſt of Judgment.

On *Thurſday* 5th *May*, 1757, On a Motion for the Judgment [or rather Sentence] of the Court upon the Defendants, for the Offence whereof they ſtood convicted,—It appearing that the Nuſance was *abſolutely* REMOVED; [the *Works being demoliſhed*, and the Materials, Utenſils and Inſtruments, *all ſold and parted with*;] They were, upon entering [Each for himſelf only, and for ſuch as acted for or under him] into a *Rule* "not to renew them," only *fined* 6s. 8d. each. But on a Diſpute afterwards ariſing, how the Rule ſhould be drawn up, It was on *Friday* 20th *May* ſettled by the Court to be thus —"By Conſent of Counſel on both Sides, It is ordered that, "upon the Defendant *Ward*'s undertaking that neither He nor "any other Perſon by *his Conſent or Direction* or for *his Uſe or* "*Benefit*, ſhall for the Future make or cauſe to be made in "the Works lately carried on by the Defendant *White* at "*Twickenham*, mentioned in the Indictment in this Cauſe, "any acid Spirit of Sulphur, or Preparations of Vitriol, or "or Oil of *Aqua fortis*; a Fine of 6s. 8d. to be ſet upon the "ſaid Defendant *Ward* for the Nuſance of which He has "been convicted." And

The Defendant *White* entered into a like Rule, *mutatis mutandis.*

* P. 339. Saturday, 21ſt May 1757.

* Bond *verſ.* Iſaac.

THE Defendant being brought into Court in Obedience to a Writ of *Habeas Corpus* applied for by his *Bail*; and it being agreed that He was in Cuſtody of the Keeper of the *Savoy*, as an *impreſſed Man*; The Counſel on Behalf of the *Bail* inſiſted upon their *Right* TO SURRENDER *him.*

THE COURT [namely Lord MANSFIELD, Mr. Juſt. *Deniſon*, and Mr. Juſt. *Foſter*] had no Doubt of their Right: But only heſitated as to the *Diſpoſition of Him*, after He had been ſurrendered. Lord MANSFIELD mentioned the Clauſe in the Preſſing Act [*V.* 29 *G.* 2 *c.* 4. *ſ.* 14. *p.* 175.] of not taking him out of the Service. Mr. Juſt. DENISON cited two Caſes; *viz.* 1 *Strange* 641. The Caſe of the Bail of *Boiſe* and *Sellers*, in this Court; Where the Defendants were returned to be charged with two Civil Suits and ſeveral *Exchequer Informations* for Frauds in the Cuſtoms: And when the Court was ſatisfied of the Reality of the Debts and Priority

Priority of the Actions here, The Defendants were ſurrendered, and committed *to the Marſhal.* And a Caſe in *Tr.* 22, 23 *G.* 2. *Rex* v. *Chitty*, *B. R.* where the Defendant was returned to be charged with a *Contempt in the Exchequer:* He was ſurrendered by his Bail here; and committed to the Marſhal; who was immediately ſerved with a new *Habeas Corpus*, to remove him to the *Fleet.*

This Man is a Soldier now; And by this Act *cannot be taken out* of the King's Service, but upon ſome CRIMINAL Matter; [*V.* the Act, as above.] So that it ſeems that He *may* be remanded to the *Savoy*, in the preſent Caſe.

Mr. Juſt. FOSTER—In the Caſes cited by my Brother *Deniſon*, the Proceedings were grounded on 25 *E.* 3. *c.* 19. [which enacts "that the King's Debtors ſhall not be protected "from the Proceedings of their other Creditors againſt "them:"] And it was a Matter of *Right.* This is an *Indulgence* to the Bail, to permit them to bring in the Defendant and ſurrender him. But We cannot take him out of the King's *Service*; this not being a *criminal* Matter: [*V. ut ſupra*, 29 *G.* 2. *c.* 4. *ſ.* 14.] So that We *may*, after We have entered an *Exoneretur* upon the Bail Piece. remand him to the legal Cuſtody at the *Savoy.*

LORD MANSFIELD—We may FIRST commit him to the Marſhal; And *then* remand him, immediately, to the *Savoy.*

‡ Suppoſe him to be a Soldier *at large*, [not in the Cuſtody;] ‡ P. 340. and that his Bail were to bring him in, and ſurrender him; He muſt be committed to the Cuſtody of the *Marſhal* upon ſuch Surrender; but *inſtantèr ſet at large*: And ſo we may do here. And accordingly,

Per Cur. He was upon being ſurrendered by his Bail, firſt committed to the Cuſtody of the Marſhal: But the Marſhal was Ordered to deliver him *Inſtantèr* to the Keeper of the *Savoy*; And He did ſo, immediately, in Court. And an *Exoneretur* was Ordered to be entered upon the Bail-Piece. *V. Poſt.*

Capron *verſ.* Archer.

UPON a Queſtion concerning the TERMS upon which the *Bail* ſhould have *Time to ſurrender the Principal*, after a Writ of *Error* brought——

Mr. Juſt. DENISON and Mr. Juſt. FOSTER, the only two Judges in Court, held That it was the ALLOWANCE of the Writ of Error, that was a *Superſedeas* to the Proceedings below;

low; And that the NOTICE of its being allowed was only to bring the Party in Poſſeſſion of the Judgment below, into *Contempt*, in caſe he ſhould perſiſt in proceeding thereupon *ſubſequently to ſuch Notice*. And therefore, as in the preſent Caſe, the Defendant's Writ of Error was ALLOWED BEFORE the Time was expired within which the Bail had Indulgence to ſurrender the Principal, THOUGH NOTICE of ſuch Allowance was not given to the Plaintiff's Attorney *till* AFTER the Expiration of that Time: The COURT gave the Bail the ſame *Terms* as are uſual where they apply WITHIN *the Time* indulged to them (by the preſent Courſe of the Court) for ſurrendering the Principal. And accordingly, the RULE to ſhew Cauſe why the Proceedings "upon the Writs of *Scire* "*facias* iſſued againſt the Bail ſhould not be ſtayed, until the "Writ of Error ſhall be determined; the Bail undertaking "to pay the Plaintiff the Damages recovered by the ſaid "Judgment, OR *ſurrender the Defendant* into the Cuſtody of "the Marſhal of the Marſhalſea of this Court within four "Days next after the Determination of the ſaid Writ of Er-"ror, in Caſe the ſame ſhall be determined in Favour of the "Defendant in Error," was MADE * ABSOLUTE.

* For the clearer Underſtanding of the *different Terms* granted to the Bail, under *different Circumſtances*, ſee *Myer* v. *Arthur*, 1 *Strange* 419. *Hunter* v. *Sampſon & al'*, 2 *Strange* 781. *Everett* v. *Gery*, 1 *Strange* 343. *Richardſon* v. *Jelly*, 2 *Strange* 1270. *Cole* v. *Bucklan d*, 2 *Strange* 872: (particularly the 1ſt and 4th of theſe Caſes; which ſhew *the Diſtinction.*)

† P. 341. Monday. 23d May 1757.

† Pelly the Younger *verſ.* Governor and Company of the Royal-Exchange Aſſurance.

THIS came before the Court, upon a Caſe reſerved on a Trial at *Guildhall*, before Lord *Mansfield*; Where a Verdict was found for the Plaintiff, ſubject to the Opinion of the Court. It was an Action of Covenant upon a *Policy of Inſurance*.

Caſe. The Plaintiff being Part-Owner of the Ship *Onſlow*, an *Eaſt-India* Ship, then lying in the *Thames*, and bound on a Voyage to *China* and back again to *London*, inſured it at and from *London*, to any Ports and Places beyond the *Cape of Good Hope*, and back to *London*; free from Average under ten *per Cent.* upon the Body *Tackle Apparel* Ordnance Munition Artillery Boat and other *Furniture* of and in the ſaid Ship: Beginning the Adventure upon the ſaid Ship, &c. from and immediately following the Date of the Policy, and ſo to continue and endure until the ſaid Ship, *with all* her Ordnance *Tackle Apparel*, &c. ſhall be arrived as above, and hath there moored at Anchor 24 Hours in good Safety. And it ſhall be lawful for the ſaid Ship, in this Voyage, to proceed and ſail to and touch and *ſtay* at any Ports or Places whatſoever, without Prejudice to this

this Aſſurance. The Perils mentioned in the Policy, are the Common Perils; *viz.* of the Seas, Men of War, FIRE, Enemies, Pirates, *&c. &c.* and all other Perils, Loſſes and Misfortunes, *&c.* The Premium was 7 Guineas *per Cent.* with the uſual Abatement of 2 *per Cent.* in Caſe of a Loſs.

The Ship ſailed *&c*; arrived in the River *Canton* in *China*; where ſhe was to ſtay, to *clean and refit*, and for other Purpoſes. Upon her Arrival there, the Sails, Yards, Tackle, Cables, Rigging, Apparel, and other *Furniture* were, by the Captain's Order, *taken out* of her, and PUT INTO *a Warehouſe or Storehouſe* called a Bank-Saul, BUILT FOR THAT PURPOSE ON a SAND BANK *or ſmall Iſland*, lying in the ſaid River, near one of the Banks, called *Bank-Saul Iſland*, about 200 or 220 Yards in Length, and 40 or 50 Yards in Breadth; *in Order* to be there *repaired, kept dry, and* PRESERVED *till* the Ship ſhould be heeled and cleaned and refitted. Sometime after this, a *Fire* accidentally broke out in the Bank-Saul belonging to a *Swediſh* Ship; and communicated itſelf to another Bank Saul, and from thence to the Bank-Saul belonging to the *Onſlow*; and conſumed the ſame, with *all the Sails, Yards, Tackle, Cables, Rigging, Apparel*, and other *Furniture* belonging to the *Onſlow*, which were therein.

* It was ſtated, that it was the univerſal and *well known* USAGE, and has been ſo for a great Number of Years, for all *European* Ships which go a *China*-Voyage, except *Dutch* Ships, (who for ſome Years paſt are denied this Privilege by the *Chineſe*, and look upon ſuch Denial as a great Loſs,) "when they arrive near this *Bank-Saul Iſland* in the River "*Canton*, to *unrig* the Ship, AND *to take out her Sails*, "Yards, *Tackle*, Cables, Rigging, Apparel, and other "Furniture; and to put them on Shore, in a Bank-Saul "built for that Purpoſe on the ſaid Iſland (in the Manner "that had been done on the preſent Occaſion by the Cap- "tain of the *Onſlow*,) in order to be there repaired kept "dry and preſerved until the Ship ſhould be heeled cleaned "and refitted." And the Caſe further ſtates that it appears that the ſo doing is *prudent*, and for the Common and General *Benefit* of the Owners of the Ship, the *Inſurers*, and Inſured, and ALL *Perſons concerned in the Safety of the Ship*. * P. 342.

The Ship arrived from her ſaid Voyage, in the *Thames*, in *September* 1755; (having been unrigged, and put in the beſt Condition the Nature of the Place and Circumſtances of Affairs would permit.)

Queſtion. Whether the Inſurers are *liable* to anſwer for *this* Loſs. *(ſo happening upon this Bank-Saul,)* within the Intent and Meaning of this Policy.

Mr *Williams*, for the Plaintiff,—after premiſing, That this Queſtion ariſes upon the Conſtruction of a Policy of Inſurance: That theſe Policies of Inſurance are of ancient Date; are beneficial, as they tend to divide the Riſque; and have been every where encouraged, in Trading Countries; made theſe three Diviſions of his Argument.

1ſt. He undertook to prove that the Plaintiff's Demands are founded on ſtrict *Juſtice*;

2dly. That they are agreeable to both the Words and *Meaning* of the Policy; and ſupported by legal Determinations.——

3dly. He ſaid He would mention the Opinion of *foreign Lawyers*, upon the Subject.

Objection. Indeed it has been objected "that this is *not* a Loſs AT "SEA;" But "A Loſs at *Land*."

Anſwers to it. Firſt, The Policy is *general*; It is *not confined* to Loſſes *at Sea*.

* P. 343. * Secondly—This is *not* a Loſs *at Land*: It is what happened upon a *Sand Bank in the River*.

Then he proceeded to his 3 Heads or Diviſions of his Argument.

1ſt Head of Argument. 1ſt. As to the *Juſtice* of the Plaintiff's Caſe—

The Inſurers have profeſſedly and explicitly inſured the Ship and all her Rigging, Furniture, *&c.* from Fire, *&c.* *from* her going out TO her RETURN: And they muſt be taken to be *apprized of the Uſage*; and to have *calculated* their Premium *accordingly*. And what has here been done is ſtated to have been done "for the *Benefit of the Inſurers*, and of the "*Ship*, and of *all* Perſons concerned in the *Safety* of it;" and alſo "to have been *prudent*."

If the *Body* of the Ship had been burnt in this Interim; and theſe Sails and Furniture, had been *ſaved* BY BEING *in this Warehouſe*; the Inſurers would then have had the Benefit of *this Salvage*. Therefore they ought, in the *contrary Event*, to be *anſwerable* for them, when *they* were by theſe Means

Means burnt, and the *Ship not* burnt. It was the Captain's Duty to perform the Voyage in the uſual and proper Courſe. And this was ſo far from being a Neglect or Miſbehaviour in the Captain, that He is ſtated, "to have *acted* PRUDENTLY, "and for the BENEFIT *of the Inſurers and of All concerned.*"

2dly. This is within the *Words* of the Policy—'Tis an Inſurance "from *London* to any Ports or Places beyond the "*Cape of Good Hope*, and back; and DURING THE VOY-"AGE:" And *Fire* is expreſsly inſured againſt. 2d Head of Argument.

And it is alſo within the *Meaning* and *Intent* of the Policy. For this Loſs has happened within the USUAL *Courſe of the Voyage*, and of this Species of Trade. And therefore the Inſurers are liable. And this is the true Diſtinction. To prove which, He cited 2 *Salk.* 445. *Bond* v. *Gonſales*: "Deviation or not, muſt be taken according to the Neceſſity "and *Uſage.*" *Clayton* v. *Simmons* 11th *March* 1741. at *Guildhall*. *Per Lee* Ch. J. "If the Maſter puts into a Port "not uſual, or ſtays an unuſual Time, it is a Deviation, "and diſcharges the Inſurer: *Not*, if he does *as* USUAL." *Tierney* v. *Etherington* 5 *March* 1743. *per Lee*, Ch. J. at *Guildhall*—The Goods were unloaded and put into a *Store-Ship* at *Gibraltar*; and there loſt. The Queſtion was, Whether this was a Loſs at Land; or a Loſs *in the Voyage*. He held "that Policies ought to be conſtrued largely, and for the "Benefit of the *Inſured*; and according to the Courſe of "Trade and the Methods USUAL *at the Place:*" And * as that was the known Courſe of Trade at *Gibraltar*, He held "the Inſurers to be reſponſible" And in *Eaſter* Term following (P. 1744. 17 *G.* 2.) There was a Motion for a new Trial: Which was *refuſed*. Now that was not within the *Words* of the Policy: And yet holden to be within the *Meaning* of it. * P. 344.

Where an Inſurance is for one entire Voyage, the Contract can *not* be *ſuſpended*, and *revived* again: If it be ſuſpended *at all*, 'tis *determined*. And yet they will hardly argue, that this Contract was *abſolutely determined* by this Act that is ſtated.

3dly. As to the Opinions of foreign Writers They hold —"that where the Aſſurance is general, the Inſurer is "liable to all Loſs happening in the *uſual* Courſe of the "Voyage." 3d Head of Argument.

And to this Purpoſe, he cited, *Loccenius, de Jure Maritimo L.* 2. *c.* 5. *ſect.* 10. *de Averſione Periculi.* Whoſe diſtinctions turn upon the Maſter's purſuing the *uſual* Courſe of the Voyage, *Marcarius, de Jure Mercator. L* 2. *c.* 15. No. 148. *Roccus, de Aſſecurationibus*, No. 138. the Inſurer is liable for all Loſſes *durante Itinere.*

So that the Principles of Juſtice and Equity, the Strictneſs of Law, and the Opinions of Foreign Writers, All concur in Favour of the Plaintiff.

Sir *Richard Lloyd*, for the Defendants (the Inſurers,) agreed to Mr. *Williams*'s General Principles; And that the Inſurers were liable for all Loſſes during the *Courſe of the Voyage*: But He denied Mr. *Williams*'s Concluſions; and inſiſted that this Policy was certainly confined to Loſſes *at Sea*: Whereas *this* Loſs was a Loſs *on* SHORE. This is a Policy upon the Body of a *Ship*; And therefore is manifeſtly confined to Loſſes *at Sea* only. Beſides, theſe Goods are averred by the very Declaration itſelf, "to have been "carried * *on Shore*." And its being an Inſurance "*out* "and *Home*," does *not interfere* with this Poſition. As to the Suppoſition "that the *Ship* had been burnt, and the "*Sails*, &c, ſaved;" It is no Argument at all: For if they had NOT *been loſt*, the Inſurers could *not* certainly have been *liable* to pay for them. As to the *Prudence* of the Captain —It might be prudent with Regard to the *Owners*: But this Care of *them* is not to affect the *Inſurers*. He is indeed to act his beſt, for Both: but *diverſo Intuitu*; and not to ſerve the One, at the *Riſque* of the Other. As to the *Words* of the Policy—He denied it to be *within* them; referring Himſelf to the Words themſelves.

* Some of the Breaches are ſo Aſſigned.

The *Caſes cited* do not affect the preſent Caſe: And *foreign* Writers have ſaid no more than *Engliſh* Ones. For no Doubt, the Inſurance muſt be underſtood to be in the *uſual Courſe of Trade*, and *durante Itinere*. But the Queſtion is, "WHAT is the *Iter* inſured."

* P. 345. * This is a *Common* Policy of Inſurance, in the old and ordinary Form; And it muſt be underſtood, as theſe Policies were underſtood, before the *Eaſt India Company* had a Being. And the *Intent* of it muſt be collected from the Inſtrument *itſelf*.

Now this is an Inſurance of the Ship with its Tackle and Forniture, &c, *from Port to Port*. And Policies muſt be conſtrued upon the *Words* of them, or from *neceſſary Conſequences*. If any Thing *beyond* the natural Import of the Words was intended, it ought to have been *ſpecified*: If not ſpecified, it cannot be ſuppoſed.

The *Court alone* are to judge of the *Extent* of the Contract. And theſe contracts have been conſtrued *ſtrictly*. A *Deviation* from the particular Voyage inſured, ſhall diſcharge the Inſurer; unleſs a *Neceſſity* intervenes; which does, and ought to alter the Caſe. But even that muſt be *within the Compaſs of the Voyage deſcribed*: For if it happens AFTER *a Deviation*, the Inſurer is diſcharged, even though the Ship ſhould have returned into the right Road again, before the

Ac-

Accident happened. Now this preſent Accident did *not* happen WITHIN *the Voyage inſured:* For it happened AT LAND.

But Mr. *Williams* ſays "this happened in the *Courſe of* "*Trade*" My Anſwer is, "That We have nothing to do "with the Courſe of *Trade.*" We have nothing to do with any Thing but the Courſe of NAVIGATION; which is quite a different Thing. Theſe Sails, Tackle, *&c*, were inſured IN *the Ship:* And if the Captain takes them *out* of the Ship and puts them *any where* ELSE, the Inſurers are *not* anſwerable. And its being for the *Benefit* of the Ship, *&c*, makes no Difference. It did not ariſe from Neceſſity: Much leſs from a Neceſſity ariſing in the Voyage. This Act of mere Prudence or Convenience cannot affect the *Inſurers.* And their *knowing* this to be the Courſe of the Voyage, will not prove that they meant to inſure any Thing at *Land.* They *cannot*, by their Charter, do it; for that reſtrains them from inſuring at Land: and therefore they certainly *never intended* it. As to the Caſe of *Tierney* v. *Etheringtone* P. 17 *G.* 2. It was *not* a *Common* Policy. It was thereby agreed "that they "might unload, *&c*, *and reſhip* into an *Engliſh* Ship." But no *Engliſh* Ship being there, they unloaded upon a *Store* Ship. And this was a Peril *at* SEA; for the Ship was loſt at *Sea*: So that it ſtrictly and properly was WITHIN *the Voyage.* And as to its being the Mode of Re-ſhipping, in Caſe no other Ship was there; here is no ſuch Agreement in the preſent Caſe, as was there inſerted in the Policy: So that it was within the very *Terms* of the Policy in that Caſe. He cited the Caſe of *Fitzgerald* v. *Pole*, in *P.* 23 *G.* 2. in *B. R.* and afterwards in *Dom' Proc.* in *May* 1752; which was an Inſurance of a Privateer for * four Months: And there the *whole Cruize* was by this Court underſtood to be inſured; And the Inſurers were holden here, to be bound, though the Ship itſelf was ſafe; and accordingly they gave Judgment for the Plaintiff. But the Houſe of Lords held them diſcharged; as the *Ship* was ſafe; and affirmed the Judgment of the Exchequer Chamber, who had reverſed that of *B. R.* And there is no Inconvenience in my Doctrine: Becauſe whatever is by the Parties particularly *meant* to be inſured, *beyond* the general Meaning of the Words, may be *ſpecially* inſerted in the Policy; And then all will be clear; and nothing left to uncertain Conſtruction.

* P. 346.

Mr. *Williams* in Reply—

This Fire happened *during the Courſe of the Voyage.* And this Inſurance is *not merely* upon the Ship; but upon the Rigging, Sails *Tackle and Furniture* likewiſe; which in their Nature are capable of being carried on Shore, and *uſually* are ſo, upon theſe Occaſions, as is expreſly ſtated.

And

And this is a Loſs happening in *Port*. It is the proper and the only Port, where the *Engliſh* can clean and refit their Ships. And being *upon a Sand Bank* in the River, is a Loſs at *Sea*, not at Land. If the Goods cannot be removed from on Board One Ship to another, the Reaſon of that muſt be, that the Inſurer has had only that *particular Ship* in Contemplation, on *which* he inſured; and perhaps the Care and Caution of the *Maſter* of it too, *as well* as the *Goodneſs* of the Ship.

This taking out and depoſiting the Rigging, Sails and Furniture was a *neceſſary Act*; and is done by all the Nations in *Europe*, except the *Dutch*; who are ſtated to conſider it as a Diſadvantage that they are not permitted to do it. And it is ſtated to be for the Benefit of the Ship, and of the Inſurers, and All concerned. And this being the uſual Courſe of the Voyage, it was unneceſſary to particularize or ſpecify this in the Policy: It muſt neceſſarily have been in the Contemplation of the Inſurers.

And as to the Company's being *obliged by their Charter*, not to inſure on Land—The Merchants inſuring with them are *not obliged to know* this; Nor do the Company in fact *practiſe* it. Beſides, if they *do it*, *notwithſtanding* their Charter, they are not the leſs bound to anſwer what they have undertaken. And indeed the Charter only means to preclude them from inſuring *Houſes and Buildings* at Land, (which is quite another thing;) *not Ships* at Land.

As to the Caſe of *Fitzgerald* v. *Pole*, There was *no* Loſs of the *Thing inſured*: Whereas here is a Loſs of the *very Thing* inſured.

*P. 347. *Lord Mansfield ſaid it was neceſſary that the Determinations upon Policies of Inſurance ſhould be fixed and certain: And therefore they would conſider this Matter, and look into the Caſes, and then (within the Term) give their Opinion,

Cur. advisare vult.

Lord Mansfield now delivered the Opinion of the Court.

He ſtated the Caſe minutely, and then the Queſtion: which was "Whether *this* was a Loſs for which the Inſurers "are *reſponſible*, within the *Intent and Meaning* of the above "mentioned Policy of Inſurance."

By the expreſs Words of the Policy, the Defendants have inſured the *Tackle*, *Apparel*, and other *Furniture of the Ship Onſlow*, from *Fire*, during the *whole* Time of her Voyage, *until* her Return in Safety to *London*, *without any Reſtriction*.

Her

Her Tackle, Apparel, and Furniture were inevitably burnt in *China, during the Voyage,* before her Return to *London.*

The Event then which has happened is a Loſs within the *General* Words of the Policy: And it is incumbent upon the *Defendants,* to ſhew, from the Manner in which this Misfortune happened, or from other Circumſtances, "that it "ought to be conſtrued a Peril which they did *not undertake* "to bear."

From the Nature, Object, and Utility of this Kind of Contract, Conſequences have been drawn; and a Syſtem of Conſtruction eſtabliſhed, upon the ancient and inaccurate Form of Words in which the Inſtrument is conceived.

The Mercantile Law, in this Reſpect, is the ſame all over the World. For, from the *ſame* Premiſſes, the ſound Concluſions of Reaſon and Juſtice muſt univerſally be the *ſame.*

Hence, among many others, the following Rules have been ſettled.

If the *Chance* is *varied* or the *Voyage altered* by the *Fault* of the Owner or Maſter of the Ship, the Inſurer ceaſes to be liable: Becauſe he is underſtood to engage that the Thing ſhall be done, ſafe from fortuitous Dangers; *provided* due Means are uſed by the Trader to attain that End.

* But the Maſter is *not in Fault,* if what he did was done * P. 348. in the *uſual Courſe,* or *neceſſarily ex juſta Cauſa.*

The Inſurer, in eſtimating the Price at which He is willing to indemnify the Trader againſt all Riſques, muſt have under his Conſideration the *Nature* of the Voyage to be performed, and the *uſual Courſe and Manner* of doing it. *Every* thing done in the *uſual Courſe* muſt have been *foreſeen* and in *Contemplation,* at the Time he engaged. He took the Riſque, upon a Suppoſition that what was uſual or neceſſary, *would* be done.

It is abſurd to ſuppoſe, when the *End* is inſured, that the uſual *Means of obtaining it* are meant to be *excluded.*

Therefore, when Goods are inſured "*till landed*;" without *expreſs* Words, the Inſurance extends to the *Boat,* the *uſual Method* of Landing Goods out of a Ship, upon the Shore.

If

If it is *uſual* to ſtay ſo long at a Port, or to go out of the Way, the Inſurer is conſidered as *underſtanding that Uſage*. *Bond* v. *Gonſales*, 2 *Salk*. 445. was ſo ruled by Ld. Ch. J. *Holt*.

If Goods are inſured on Board *one* Ship, to a Port, and from thence, on board *another* Ship, the firſt that can be got; The Inſurance *extends* through *all the intermediate Steps* of removing from one Ship to the other, *as uſual*. * For the *Means* muſt be taken to be inſured, as well as the *End*.

* Ut ſupra.

All this has been determined in the Caſe of *Tierney* v. *Etherington* at *Guildhall*, 5th *March* 1743. That was an Inſurance of Goods in a *Dutch* Ship, from *Malaga* to *Gibraltar*, and at and from thence to *England* and *Holland*, both or either; on Goods as here under agreed; beginning the Adventure from the Loading, and to continue till the Ships and Goods be arrived at *England* or *Holland*, and there ſafely landed.

The Agreement was "That upon the Arrival of the "Ship at *Gibraltar*, the Goods ought be *unloaded*, and *re-* "*ſhipped* in one or more *Britiſh Ship or Ships*, for *England* "and *Holland*; and to return One *per Cent*. if diſcharged in "*England*."

It appeared on Evidence, that when the Ship came to *Gibraltar*, the Goods were unloaded, and put into a *Store-Ship*, (which it was proved was always *conſidered as a Warehouſe*;) and that there was then *no Britiſh* Ship there. Two Days after the Goods were put into this *Store-Ship*, they were loſt in a Storm.

* P. 349. * For the Defendant, it was inſiſted that the Inſurance was only upon the *Dutch* and *Britiſh* Ships; and that it did *not extend* to the *Store-Ship*; which is conſidered *as a Warehouſe at Land, and ſo not a Peril at Sea*.

For the Plaintiff, It was inſiſted. That this was a Loſs *in the Voyage*: For the Policy is, for all Loſſes *at Gibraltar*, as well as to and from. If there had been a *Britiſh* Ship there, and the Goods had been put into a *Lighter*, in order to go to the *Britiſh* Ship, and loſt in the Way; That it would have been a Loſs within the Policy. We have Liberty to unload and reſhip; and therefore have a Liberty to uſe all the *Means* in Order to do that.

Lee, Ch. J. ſaid—It is certain, that in Conſtruction of Politics, the *ſtrictum Jus*, or *Apex Juris* is not to be laid hold on: But they are to be conſtrued largely, for the Benefit of Trade, and *for the Inſured*. Now it ſeems to be a ſtrict Conſtruction, to *confine* this Inſurance only to the unloading and reſhipping, and the Accidents attending that

Act.

Act. The Conſtruction ſhould be *according to the Courſe of Trade in this Place.* And this appears to be the *uſual Method* of unloading and reſhipping in that Place: *Viz.* "That "when there is no *Britiſh* Ship there, then the Goods are "kept in Store-Ships."

He added, that where there is an Inſurance on Goods on Board ſuch a Ship; *that* Inſurance extends to the carrying the Goods to Shore, in a *Boat.* So if an Inſurance of Goods to ſuch a *City*; and the Goods are brought in Safety to ſuch a *Port*, though diſtant from the City: That is a Compliance with the Policy, if that be the *uſual* Place to which the Ships come.

Therefore as here is a Liberty given of unloading and reſhipping, It muſt be taken to be an inſuring the Goods under *ſuch Methods* as are *proper* for the unloading and reſhipping. Here is no Neglect on the Part of the Merchant, (the Inſured:) for the Goods were brought into Port the 19th and were loſt the 22d of *November.*

This Manner of unloading and reſhipping is to be conſidered as the *neceſſary Means* of attaining that which was intended by the Policy; and ſeems to be the ſame as if it had happened in the Act of reſhipping from one Ship to the other. And *as this is the known Courſe of Trade, it ſeems extraordinary if it was not intended.*

This is *not* to be conſidered as a *Suſpenſion* of the Policy, during the unloading and reſhipping from One Ship to another. For, as the Policy would extend to a Loſs happening * in the unloading and reſhipping from One Ship to Another, ſo any *Means* to attain that *End* come within the Meaning of the Policy. * P. 350.

And accordingly a Verdict was given for the Plaintiff.

In the *Eaſter* Term following, a new Trial was moved for: But was refuſed, by Lord Ch. J. *Lee*, Mr. Juſt. *Chapple*, and Mr. Juſt. *Deniſon*; Mr. Juſt. *Wright* indeed being of a different Opinion; namely, "that it was a Removal at the "Peril of the *Inſured.*"

So in the preſent Caſe, the ſame reaſoning will hold. And, in general, What is *uſually* done by ſuch a Ship, with ſuch a Cargo, in ſuch a Voyage, is underſtood to be *referred* to by *every* Policy; and to make a *Part of it*, as much as if it was *expreſſed.*

The *Uſage*, being *foreſeen*, is *more* ſtrongly allowed to be done, than what is left to the Maſter's Diſcretion upon *unforeſeen* Events: Yet if the Maſter, *ex juſtâ Cauſa*, goes out of the Way, (as to refit, or to avoid Enemies, Pirates &c.) the Inſurance *continues.*

Upon

Upon theſe Principles, It is difficult to frame a Queſtion which can ariſe out of this Caſe, as ſtated.

The only Objection is, " That they were burnt in a Bank-" Saul and *not* IN *the Ship* ; upon *Land*, and *not at Sea* or " upon *Water* ; and being appertinent the *Ship*, Loſſes and " Dangers *aſhore* could not be included."

The Anſwer is obvious. (1ſt.) The *Words* make no ſuch Diſtinction. (2dly.) The *Intent* makes no ſuch Diſtinction,

Many Accidents might happen *at Land*, even to the *Ship*.

Suppoſe a Hurricane to drive it a Mile on Shore, or an Earthquake may have a like Effect. Suppoſe the Ship to be burnt in a dry Dock. Or ſuppoſe Accidents to happen to the Tackle upon Land, taken from the Ship, while accidentally and occaſionally refitting; as on Account of a Hole in its Bottom or other Miſchance.

Theſe are poſſible Caſes. But what might ariſe from an *accidental* Occaſion of refitting the Ship, is not near ſo ſtrong as a *certain neceſſary* Conſequence of the *ordinary* Voyage, which the Parties could not but have in their direct and immediate Contemplation.

Here, the Defendants *knew* that this Ship *muſt* be heeled, cleaned and refitted, in the River of *Canton*. They *knew* that the Tackle *&c*, *would* then be put in the Bank Saul. They *knew* it was for the *Safety* of the Ship, and *prudent*, that they *ſhould* be put there.

*P. 351. * Had it been an *accidental Neceſſity* of refitting, the Maſter might have excuſed taking them out of the Ship *ex juſtâ Cauſa*. But deſcribing the Voyage is an *expreſs Reference* to the uſual Manner of making it, as much as if every Circumſtance was mentioned.

Was the Chance varied by the *Fault* of the Maſter? It is impoſſible to impute any *Fault* in him.

Is this like a *Deviation?* No: 'Tis *ex juſtâ Cauſa*; Which always excuſes.

And yet Sir *Richard Lloyd*, being preſſed in his Argument, was obliged to inſiſt " that it reſembled a Deviation : " Which determines the Inſurance, and diſcharges the " Inſurer."

Anſwer. This ſuppoſes the Parties to inſure from *London* and back again, knowing that the Policy would be determined

mined in the River of *Canton*: Which would be abſurd. Beſides, it ought to make a Difference in the Premium: Yet the Under-Writers have All kept the Premium upon other *China* Voyages.

One Objection was formed by comparing this Caſe to that of changing the ſhip or Bottom, on board of which, Goods are inſured: Which the Inſured have no Right to do.

Anſwer. *There*, the identical Ship is eſſential: For *that* is the Thing inſured. But that Caſe is not like the preſent.

Another Objection was, "That Policies ought to be conſtrued *ſtrictly*, and *not* to be extended to *Caſes omitted*:" (Which latter Poſition is true; and muſt be agreed.)

Anſwer—But that is not the preſent Caſe: For this is not a *Caſus Omiſſus*; but clearly within the View and *bona fide* Intent of the Policy.

The Caſe of *Fitzgerald* v. *Pole* is no way applicable to the preſent. The Queſtion there was "Whether it was a partial, or a total Loſs, within the Meaning of the Policy." In that Caſe, there was nothing fixed by Uſage, or by known and eſtabliſhed Conſtruction, (as there is in this Caſe:) So that no Inference can be drawn from that Caſe, concluding to this.

Here, the Defendans *knew* that the Tackle and Furniture would be put in this Bank-Saul, as the *uſual*, *certain* Conſequences of the Voyage at Sea; which *always* made it * *neceſſary* to heel clean and refit the Ship in the river of *Canton*. Had the Inſurers been aſked, they muſt for their *own* Sakes, have inſiſted they ſhould be put there, as the beſt and ſafeſt Method. They would have had reaſon to complain, if, from their *not* being put there, a Misfortune had happened: In *that Caſe*, the Maſter *would* have been to blame, and by his Fault *would* have varied the uſual Chance. * P. 352.

They have taken a Price for ſtanding in the Plaintiff's Place, as to *any* Loſſes He might ſuſtain in performing the *ſeveral* Parts of the Voyage: of which, *this* was *known* and *intended* to be *One*.

Therefore We (All of Us who ‡ heard the Argument) are very clearly of Opinion, That in every Light and every View of this Caſe, in Reaſon and Juſtice, and within the Words Intent and Meaning of the Policy, and within the View and Contemplation of the Parties to the Contract, the Inſurers ARE LIABLE to anſwer for this Loſs. Wherefore,

‡ Mr. Juſt. Wilmot was not preſent; being engaged in Chancery, as one of the Lords Commiſſioners.

Per Cur. Let the POSTEA be delivered to the Plaintiff.

Anderſon

Anderſon *verſ.* George.

UPON a Rule for the Plaintiff to ſhew Cauſe "Why a "*Verdict* obtained by Him for 16l. ſhould not be ſet "aſide, and a new Trial ordered, UPON *Payment of Coſts*;"

The Caſe appeared to be, That the Plaintiff had ſold Goods to the Defendant: Who paid for them by a Promiſſory Note of One *Hopley*; which the Defendant indorſed. The Plaintiff demanded the Money of *Hopley*: But indulged Him with further Day of Payment, ſeveral times; till *Hopley* broke.

The only Diſpute between the Parties was, "*Which* of "them ought to bear the Loſs of this Note." For the Plaintiff was paid; if the Loſs ought to fall upon Him, through his Neglect or Indulgence in giving further Credit to *Hopley*.

There were *two Counts* in the Declaration: One for *Goods ſold*; the Other, againſt the Defendant as Indorſer of the Promiſſory *Note*.

When the Cauſe came on to be tried, though both Parties came to try the *real Merits* of the Queſtion between them, *viz.* "*Which* ſhould bear the Loſs of the *Note* occaſioned by "*Hopley*'s Failure:" And the Plaintiff's Agents had the *Note in Court*; Yet, finding upon their own Evidence, * P. 353. "* that the Plaintiff had given repeatedly further Credit to "*Hopley*," they reſorted to a TRICK, and reſted their Caſe upon proving the Sale and Delivery of the *Goods*, which never was diſputed. The Defendant could not produce the Note: It was in the Plaintiff's Cuſtody. Relying upon its being the only Ground of the Plaintiff's Caſe, the Defendant had not given him NOTICE "*to produce it.*" The Count, ſtating it, could not be given in Evidence: And the Defendant had not intitled Himſelf to prove the Contents, for want of Notice to produce it. LORD MANSFIELD told them, at the Trial, it was an improper Artifice; That no Verdict could ſtand, which was ſo obtained. But the Plaintiff *refuſed to produce* the Note; and had a Verdict, of Courſe.

It was now contended, for the Plaintiff, that the Verdict was *regular*, and the Plaintiff in *no Fau't*: For, without Notice, He was *not obliged to produce* the Note. Therefore the Verdict ought not to be ſet aſide.

The COURT thought the Plaintiff had taken an *unfair* Advantage, *contrary to Juſtice and good Conſcience*. That the

the Rules of Practice muſt be *general:* But he who abuſed them in a particular Caſe, ſhould not ſhelter a *Trick*, by *Regularity*. The Plaintiff did not want Notice to produce a Note he *had in Court*, and which he had laid in the Declaration as his *Ground of Action*. Beſides, He took a Verdict for the Price of the Goods; *though* he had *received Satisfaction*, the Evidence of which was in his own Cuſtody and *ſuppreſſed*.

They not only ſet aſide the Verdict; but ſet it aſide WITHOUT *Payment of Coſts:* And declared, "the next Time "that a Party ſhould obtain a Verdict in like Manner, by "an *unfair unconſcionable* Advantage, without trying the "real Queſtion, they would ſet aſide the Verdict, and make "*Him pay the Coſts.*"

A new Trial being ordered, This Cauſe was tried at *Guildhall*, the Sittings after this Term: And the *Defendant* had a Verdict upon the *Merits*, to the Satisfaction of every Body; the Caſe being clear beyond a Doubt.

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* Rex *Verſ.* Inhabitants of Bentley. * P. 354.

See this CASE *abridged*, in the TABLE; and *at large* in the Quarto Edition of my SETTLEMENT CASES, No. 135. pa. 425.

The End of *Eaſter* Term 1757. 30 *Geo.* 2.

Trinity

* P. 357.

* Trinity Term

30 & 31 Geo. 2. B. R. 1757.

Monday, 13 June 1757.

Rex *verſ.* Inhabitants of Great Torrington.

See this CASE *abridged* in the TABLE; and *at large*, in the Quarto Edition of my SETTLEMENT CASES, No. 136. pa. 428.

* P. 358.

* *V.* the next Caſe, *Rex* verſ. *Inhabitants of Keynſham*: which is the ſame Point, and determined on the like Conceſſion of the Adverſe Counſel.

Tueſday, 14 June 1757.

Rex *verſ.* Inhabitants of Keynſham.

See the laſt Caſe—S. P.

This CASE is alſo *abridged* in the TABLE; and may be ſeen *at large* in the abovementioned Book, No. 137. p. 439.

Weller *verſ.* Goyton and Walker.

Wedneſday, 15 June 1757.

ACTION againſt *Two*, upon a JOINT-Promiſe; *Judgment againſt Walker*, by Default; Iſſue joined by *Goyton*; and the Plaintiff neglected to bring it on to Trial: And the Common Rule was obtained, for Judgment *as in Caſe of* a NON SUIT.

This

This was a Queſtion on 14 *G.* 2. *c.* 17. §. 1. concerning the Court's giving Judgment as in Caſes of Non-Suit: And it aroſe upon a Doubt of the Maſter's "Whether He could "tax Coſts as in Caſe of a *Non-Suit*; as there was a Judgment by Default, *for the Plaintiff*, againſt the *Other* Defendant."

* Mr. *Lawſon* moved for the Direction of the Court to the Maſter, that he ſhould tax the Defendant *Goyton* his Coſts, *purſuant to the Rule.* * P. 359.

Lord Mansfield (though no Counſel appeared on Behalf of the Plaintiff) had a Doubt, "Whether there could "be *Judgment* as *in Caſe of a Non-Suit*, in a Caſe where the "Plaintiff was not *liable* to a Non-Suit." This Act of 14 *G.* 2. *c.* 17. enacts "that all Judgments given by Virtue of "it, ſhall be of the like Force and Effect, as *Judgment upon* "*Non-Suit*; and of no other;" (§. 2:) And provides "that "the Defendant or Defendants ſhall, upon ſuch Judgment, "be awarded his her or their Coſts, in any Action or Suit "*where He She or they* would upon Non-suit *be intitled* "*to the ſame*; and in No other Action or Suit whaſoever." (§. 3.) So that the Point ſeems to be "Whether the Plaintiff "*could*, in this Caſe, have been nonſuited at the Trial." For if he could not, then the Caſe of a Non-Suit *does* not *here* exist: And conſequently the Court cannot give Judgment and Coſts, as *in Caſe* of a Non-Suit, when the Caſe of a Non-Suit does not at all exiſt. Now here was a *Judgment* obtained *by* the Plaintiff *againſt One* of the Defendants, *already*: How then can the Plaintiff be out of Court *as to* Him? But *if he is nonſuited* in this Action, He will be out of Court, as againſt *both* Defendants.

Mr. Juſtice Denison ſeemed to think, alſo, that the Plaintiff would *not* have been liable to a *Non-Suit* at the Trial. And to that Purpoſe, He recollected and mentioned the Caſe of *Greeves* v. *Roll* and *Newell*: which is wrong in 2 *Salkeld* Title *Nonſuit*, *pl* 5. pa. 456. †

Nothing was taken by the Motion.

† See S. C. alſo, at large, in Caſes in B. R. temp. W. 3. Pa. 651 (called 12th Mod.) and in 1 Ld. Raym. 716. (Both better reported)

all

Hall et Ux' *verſ.* Woodcock.

Trin 1756. 29, 30 *G.* 2. *Rot'lo.* 921.

(Lord Commiſſioner Wilmot *abſent in Chancery.)*

ERROR to *reverſe a Common Recovery.* The Error aſſigned was—"that the Vouchee, before the Render-"ing of the Judgment, died without Iſſue." Upon the *Scire faciaſes* previouſly iſſued againſt the Demandant in the Writ of Entry and againſt the Terre-tenants, *&c*, who were returned to have been ſummoned, *&c*, and thereupon Er-
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Serjeant *Foole* for the Demurrer, *viz.* for the Plaintiffs in the *Scire facias*, and in Error.

The *Scire facias* which iſſued againſt the *Terre-Tenants* is not *ex Neceſſitate*, nor *ex Debito Juſtitiæ*; but only diſcretionary in the Court, and only to ſee if the Terre-Tenant has a *Releaſe of Errors:* But the Terre-Tenant can not plead "Non-tenure," and "that *another Perſon* was Tenant of "the Freehold, at the Time of the iſſuing of the *Scire facias*." That *Other* may as well plead (in like Manner) to another *Scire facias* to be iſſued againſt *him*, "that a THIRD Perſon "is Tenant of the Freehold:" and ſo on. And the Terre-Tenant's *Title* will not be affected by *this* Judgment and Recovery: For an *Ejectment* muſt be brought. The Terre-Tenant cannot plead in *Abatement* of the Writ of Error; but *only* in *Bar* of it. 1 *Lev.* 72, 130, 146. *Winn* v. *Lloyd* is ſo. 1 *Siderf.* 213. S. C. 1 *Keb.* 54, 351, *&c*. S. C. Sir *T. Raym.* 15, 55. S. C. *Dyer* 321. *a* is alſo a ſtrong Intimation "that the Terre-Tenant can only plead in *Bar* of the "Writ of Error." The Caſe of *Winn* v. *Lloyd* is in Point. And the preſent Caſe muſt be taken to be a Plea put in merely for *Delay*, (as that was.)

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If they have a *Releaſe* to plead, let them ſhew it: If not, 'tis plainly a Plea only for *Delay*.

* V. Carthew 111, 112, accord.

Lord MANSFIELD—By the * *eſtabliſhed Method* of Proceeding there muſt be a *Scire facias* againſt the *Terre-tenants*: Otherwiſe, indeed, it is an *Irregularity*; but *no more*.

The *Terre-tenant* has *nothing to do with the Matter*. All that he can do, is only what ANY *Amicus Curiæ* may do; *viz.* produce a *Releaſe of Errors*: But he has nothing to do, *in Intereſt*. Therefore there ought to be a *Reſpond. ouſter*, in this Caſe.

As to the *other* Objections, 'tis not proper to meddle with them *yet*.

† P. 362. ‡ [Which was the Caſe in 6 Mod. 134. & 199.]

† Mr. Juſt. DENISON concurred. This is *not* like a *Scire facias* on the ‡ *Death* of a Party: 'Tis only a *Scire facias* againſt the Terre-tenant, who is *no Party to the Record*, and has *Nothing* to do with the Matter, in *Point of Intereſt*.

In *Carthew* 111, 112. The Earl of *Pembroke*'s Caſe, Theſe *Scire faciaſes* againſt the Terre-tenants are ſaid by Lord Ch. Juſtice *Holt*, to be diſcretionary, and "*not* to be *ſtricti Juris*; "but yet to have been the conſtant and uſual *Courſe of the* "*Court*; and therefore not to be departed from." And the Terre-tenant *can only plead* a *Releaſe of Errors*; to defend his own Poſſeſſion, or for the Sake of Purchaſers; But he CANNOT *plead in Abatement to the Writ*, when he is *no Party to the Suit*.

§ V. Raym. 55, 56, S. C.

In the Caſe of *Winn* v. *Lloyd*, the three Terre-tenants pleaded § three different Pleas; which were rejected as frivolous. And ſo is this; and ought to be rejected. And it is premature to enter into the Errors objected to in the Record: For Mr. *Robinſon* is only Counſel *for Woodcock*, One of the *Terre-tenants*.

Mr. Juſt. FOSTER was clearly of the ſame Opinion.

Here *Woodcock* comes in, and ſays "He has *No Intereſt* in "the Land." Therefore certainly cannot be heard, in Objection to the *Judgment*, and to ſhew *that* to be *erroneous*: *This* was no Part of the Intention of the Notice given him by the *Scire facias*. His Plea is inſufficient: Therefore he ought to anſwer over.

Per Cur. RESPOND. OUSTER.

Far,

Far, (Spinſter,) *verſus* Denn.

ERROR to reverſe a Judgment in Ejectent.

Mr. Serj. *Martin* for the Plaintiff in Error.

This was an Ejectment, wherein *Denn* was Plaintiff, and *Elizabeth Far* and *Rebeccah Savil Far* were Defendants: and Iſſue had been joined between the Plaintiff and *both* theſe Defendants. And Day was given to the Parties, *&c.* At which Day comes as well the Plaintiff as the ſaid *Elizabeth Far*; But the *other* Defendant *Rebeccah Savil Far*, doth *not* come. And the Sheriff doth not return his Writ.

Then the *Death of* REBECCAH SAVIL *Far* is SUGGESTED *upon the Roll*, in the uſual way. And a new *Venire* is awarded to try the Iſſue againſt the ſurviving Defendant * *Eliz. Far:* And it is further awarded, "That all further * P. 363. "Proceedings againſt *Rebecca Savil Far* ſhall ceaſe." Then it ſets forth the Record of the *Poſtea* at the Aſſizes; and the Recovery againſt *Elizabeth Far.* And the Judgment is "That the Plaintiff recover his Term againſt the ſaid "*Elizabeth Far.*"

Errors aſſigned—"That there is no Record of *Niſi* "*prius*;" [which Serjeant *Martin* ſaid, was only done, in Order to give them Opportunity of objecting to the Variances;] And "That Judgment is given for the Plaintiff "below, whereas it ought to have been given for the "Defendant." Then a *Certiorari* iſſued, to certify the Record of *Niſi prius:* Which was certified accordingly. And "*In nullo eſt erratum*" was pleaded, by the Defendant in Error.

This Writ of Error was brought, He ſaid, by the Approbation of the Court of *C. B.* on Conſent to wave a Motion there in Arreſt of Judgment. He cited *Biſhop*'s Caſe, in 5 *Co.* 37. *b.* to ſhew that he was at Liberty to make Exceptions *not aſſigned* for Error. Alſo 1 *Salk.* 268. S. P. *Carlton* v. *Mortagh.*

And then he proceeded to make his Objections; *viz.*

1ſt. The *Niſi prius Roll* is erroneous, in itſelf.

2dly. The *Niſi prius* Record *varies* materially from the *Plea Roll.*

3dly. This may be taken Advantage of AFTER *Verdict.*

4thly. The *Omiſſion* of "*Quod querens Nil capiat per "Breve,*" as to *Rebeccah Savil Far*, makes the Judgment erroneous.

5thly. The *Judgment* ought not to have been for more than a MOIETY of the Lands demanded.

And Firſt—The Death of *Rebeccah Savil Far*, One of the Defendants, ought to have been ſuggeſted *upon* the *Niſi prius* Record. It is NOT *ſufficient* that this be mentioned in the *Jurata* part of it. *Barnes's Notes, Tr.* 7 & 8 *G.* 2. *C. B. Fo.* 8. *Waldo* v. *Harriſon:* Where the *Jurata* in the Record of *Niſi prius* was amended. Which was done upon the Foundation that the *Jurata*-part of the Record is *not* an Award of the *Court*; but *only to annex* the Proceedings. Indeed *Rebeccah Savil Far* is, in *that* Part, ſaid to be dead: But' tis only in a *Parentheſis*, and by way of *Recital.* However, that is *not the* PLACE for a Suggeſtion of the *Death of Parties.* And it ought to be a *full and poſitive* Aſſertion; For there are to be Proceedings upon it.

* P. 364. * If any Special Matter has been ſuggeſted, about awarding the *Venire* out of the Common Courſe, a Copy muſt have been given. 1 *Strange* 235. *Brocas* v. *City of London.*

This *Recital* did *not authorize the Judge* to try the Cauſe between *One* of the Parties only. There ought to be a *New Venire* awarded: Or it ought to have been awarded againſt *both* Defendants. For here is NO *proper Suggeſtion* of the Death of One of the Defendants.

The *Jurata* is *wrong.* 2 *Hawkins P. C.* 290.

The Death muſt be *ſuggeſted.* 8, 9 *W.* 3. *c.* 11. § 7. But a *Recital* is *no* Suggeſtion. And this is *not* a Diſcontinuance; but a MIS-*Trial,* (which is not helped by the Stat. of Jeofails.)

Secondly—This *Niſi prius* Record *varies* materially from the Plea-Roll: For it is *not* between the *ſame Parties.* And *ſmall* Variances are fatal. 1 *Ld. Raym.* 329. *Doberteen* v. *Chancellor. Palmer* 378. *Young* v. *Engleſield. Cro. Eliz.* 340. *Long* v. *Michell. Viner's Abridgment* 553. *Pl.* 8. of Title *Error.*

☞ Mr. Juſt. FOSTER—Brother, VINER *is* NOT *an Authority.* Cite the Caſes that *Viner quotes: That* You may do.

Serj. *Martin* proceeded—

Thirdly—This may be taken Advantage of, AFTER *Verdict.*

Fourthly

Fourthly—The Judgment is *imperfect*, without theſe Words "*Quod querens nil capiat &c.*"

Lord MANSFIELD—Would You have it, "That he ſhall "take Nothing by the Judgment, againſt a *dead* Per- "ſon?" However, it *is* in the Entry of the Judgment, "That further Proceedings ſhall ſtay againſt this dead "Perſon."

Serj. *Martin*———

Fifthly—The Judgment ought *only* to have been for a *Moiety* of the Premiſſes. My Argument ariſes on 11 G. 2. § § See c. 19. And here *might* have been two *ſeparate* Records. *Both* are made Defendants by the Rule. It is ſaid in 1 *Ventr.* 355. If every One do not appear, the Plaintiff cannot proceed againſt the Reſt. And though Ejectments be the Creatures of the Court, Yet the Records muſt preſerve as *regular a Form* as other Records muſt; And ſo it is, even upon Common Recoveries.

* Lord MANSFIELD—If it be wrong, to award the Recovery of the Term againſt the Tenant in Poſſeſſion, HOW would You have *had* it awarded? For it might have been very inconvenient to award it in *Moieties*. * P. 365.

Serj. *Martin*—Perhaps, the *proper* Method may be, to apply to the Court where the Judgment is, "that the *Exe-* "*cution* ſhould be taken out, of ſuch Part only as was the "Poſſeſſion of the *living* Defendant."

Serj. *Hewit contra*———

Firſt—The *Niſi prius* Record is perfectly right. Even before the Statute of 8, 9 *W.* 3. *c.* 11. the Death of the Party might be ſuggeſted upon the Roll. And here it is done, upon the very next Appearance Day after the Death.

My Brother *Martin* ſays, "It is only done by way of "*Recital* upon the *Niſi prius* Roll." But it is not neceſſary to enter it upon the *Niſi prius* Roll *at all*; *unleſs* to direct the Judge, *between whom* He is to try the Iſſues, and that He has *Juriſdiction* to try it.

Secondly, Here is *no* material Variance: Whereas his Caſes are Caſes of *material* Variances. Indeed here is no Variance *at all*.

Thirdly—Here is nothing to take Advantage of.

Fourthly—The Judgment is perfect enough.

Fifthly—

Fifthly—The *Judgment* muſt be, "to recover the *Term*." Indeed the Plaintiff muſt take Care to take out *Execution* for no more than He has a Right to, by the Recovery. And Many of his Objections (even if they had any Thing in them) are *cured* by the Statute.

Serj. *Martin*, in Reply, to the ſame Effect, as before.

Lord MANSFIELD thought there was no Difficulty in the Objections. They are reducible indeed to *three*. For the 3 firſt are no more than, Whether the *Judge* had Juriſdiction to try the Cauſe, between the Plaintiff and the living Defendant only.

Now the Suggeſtion, and the Award, and All the Proceedings ſhew *One* of the Defendants to be dead; And there is an Award for the Proceedings to *ſtay* as to *this* Defendant; and to go on againſt the *other* ONLY: And the * Jury is awarded as againſt the living One, the Other BEING dead. Both were alive, when the Iſſue was joined: And it is *properly* awarded upon the Iſſue Roll; and acknowledged. And the *Niſi prius* Roll is only for the *Direction of the Judge*, to try it: And it is not traverſable on *this* Roll. And the two laſt Points are as plain.

* P. 366.

The *Judgment* is right enough: And the *Execution* muſt be taken out according to the Right and Juſtice of what is *really* recovered.

Mr. Juſt. DENISON held it not neceſſary to enter and tranſcribe the *very* WORDS of the Suggeſtion, from the Plea-Roll, upon the *Niſi prius* Roll; and all the Continuances; but *only enough* to ſhew and notify *to the Judge*, what Iſſues he was to try, and between whom. It is as properly put in here, in the *Jurata*, as any where elſe: And it could could *not* be *traverſed* on the *Niſi prius* Roll. And here is *no Variance*; but only an *Omiſſion* of what was *unneceſſary* to be put in. And there was no Need of the "*Querens nil capiat per Breve:*" there is *ſufficient without* it.

And as to the 5th Exception—They *might* be *Joint-tenants*; and then 'tis ſtrictly right. But if not, the Plaintiff recovers *his Term:* And he muſt take Care not to take out *Execution* for more than he had Right to recover.

Mr. Juſt. FOSTER was clear in concurring.

Per Cur. unanimouſly.
JUDGMENT affirmed.

Ball,

Ball, qui tam, *verſus* Cobus.

Saturday, 18 June 1757.

MR. *Whitaker* ſhewed Cauſe againſt quaſhing an Information *qui tam*, for exerciſing the Trade of a Baker at *the Pariſh* of *Speldhurſt* in *Kent*, not having ſerved an Apprenticeſhip; contrary to 5 *Eliz. c.* 4.

The 1ſt Objection taken to this Information, by Mr. *Clayton*, on the original Motion, was "That *Speldhurſt* "does not appear to be a City, Market-*Town* or Corpo-"ration: It may be a VILLAGE." For ſupporting which, He had cited 2 *Keble* 583. *Rex* v. *French*; (1ſt Exception.) which Caſe is alſo reported in 1 *Mod.* 26. S. C. *Rex* v. *Turnith*; and 1 *Ventr.* 51. S. C. But though theſe are all Reports of the ſame Caſe (which was cited by Mr. *Clayton* only out of *Keble*) Yet Mr. *Whitaker* alledged that they are inconſiſtent with each other.

* Mr. *Clayton contra*—The Act was intended *merely* for the Benefit of *Corporation:* And it has § always been taken, "that it does *not* extend to any *Village*, or any Place *leſs* "than a City, Market-Town, or Corporation." And it would be extremely *inconvenient* to the Inhabitants of all diſtant retired Villages, if it did.

* P. 367.

§ Rainsford thought otherwiſe, in 1 Mod. 26.

Lord MANSFIELD—The Queſtion is *not* now upon the *Evidence*; but upon the LAYING the Offence. Have You any Authority, that it may not be *laid* at a *Pariſh*?

Mr. *Clayton*—None but that in *Keble*; (*viz.* 2 *Keb.* 583.)

LORD MANSFIELD—There is nothing in the Act, that reſtrains it to be LAID in a City, Market-Town, or Corporation: And this *Laying* it in a *Pariſh* will *not affect the* EVIDENCE.

Mr. Juſt. DENISON expreſſed himſelf in Terms exactly to the ſame Effect.

Mr. Juſt. FOSTER—*Many* Trades are carried on in *Villages*; Moſt of the *Cloth*-Trade in *Yorkſhire*, is carried on in the *Villages*.

Mr. *Clayton* offered another Objection; *viz.* That it was not averred "that he did not *then* exerciſe the Trade, (namely, at the Time of Making the Act.) But

2d Objection.

THE

The Court (without any Hesitation) over-ruled this Objection. So that, (Both Objections being over-ruled.)

The Rule "to shew Cause why the Information "should not be quashed," was *discharged*.

Tarrant *versus* Haxby.

Mr. *Norton* and Mr. *Winn* moved for a *Prohibition* to the Consistory Court of *York*, to stay their Proceedings against *Tarrant* the present Parish Clerk of St. *Osith* in *York*; which Proceedings were there instituted at the Instance of *Haxby* the *deprived* Parish-Clerk, for the *Restoration* of the said *Haxby*.

The *Office* of Parish Clerk is of a *temporal* Nature: And the *Fees* are of *temporal* Cognizance. There are two Cases in Sir *J. Strange*'s Reports, to this Purpose: *V.* 2 *Strange* 942. *Peak* v. *Bourne*; and 2 *Strange* 1108. *Pitts* v. *Evans*, *C. B.* And there is an express Case in 2 *Brownl.* 38. * *Gaudye*'s Case with Dr. *Newman*, *C. B. P.* 8 *Jac.* 1. That the Office of Parish Clerk is *Lay*; And the Spiritual Court have no Jurisdiction concerning his Deprivation.

* P. 368.

This *Haxby*, they said, was deprived by the Parson and the whole Parish, for Drunkenness during Divine Service, and other Misdemeanors: Whereupon, the Parson appointed *Tarrant* in his Room. Against whom, *Haxby* libelled, in the Consistory Court of *York*: Where there was a Monition; and they were proceeding to restore *Haxby*. And all this was suggested. Upon which, a Rule was granted, to shew Cause. And now Mr. *Nares* was to have shewn Cause: But being satisfied that it was too strong against Him, He would not trouble the Court. Whereupon,

The Rule for the *Prohibition* was made *absolute*.

Monday, 20 June 1757.

Rex *versus* Inhabitants of Uffculme.

See this Case *abridged*, in the Table; and *at large*, in the Quarto Edition of my Settlement Cases, No. 138. p. 430.

Rex

* Rex *verſ.* Inhabitants of Milwich. * P. 371.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, No. 139. pa. 433. Monday, 20 June 1757.

Harris *verſ.* Huntbach. * P. 373.

THIS was a Cauſe in the Civil Paper; and came before the Court, upon a Caſe reſerved for the Opinion of the Court, in an Action upon a *general Indebitatus Aſſumpſit*, in which the Plaintiff declared upon two Counts; The firſt of which was for Money *lent and advanced* by the Plaintiff, at the Defendant's Requeſt: The 2d was for Money *laid out and expended* by the Plaintiff, at the *Defendant's Requeſt:* And the Queſtion upon the Caſe ſtated, was "Whether the *Evidence ſupported the Declaration.*" Tueſday, 21 June 1757.

The Caſe ſtated—1ſt. That a Note of the Defendant's was produced in Evidence by the Plaintiff in the following Words: "3d *December* 1751. Then received of Mr. "*Harris* the Sum of 19l. on the Behalf of my Grandſon: "Which I promiſe to be *accountable for*, on Demand. "Witneſs my Hand *S. Huntbach.*" This Evidence was produced in Support of the firſt Count.

On the 2d Count—The Evidence was, that one *Daviſon* coming to the Plaintiff, by the Defendant's Order, for Money to pay Workmen, the Plaintiff refuſed to pay the Money, unleſs the Defendant would ſign a Receipt. Whereupon the Defendant wrote the following Note, *viz.* "Mr. *Harris*, At the earneſt Requeſt of the Gardener, "the workmen wanting money greatly, for the Work at "the Woodhouſes, This is to certify that it is *My Re-* "*queſt* that You pay to Mr. *Daviſon*, on the Account of "Maſter *Hillier*, for the Workmens Uſe the Sum of 15l. "As Witneſs my Hand *S. Huntbach.*" And a Receipt was given by the ſaid *Davidſon*, the Gardener, to the Plaintiff, on the Plaintiff's paying him this 15l. Verdict for the Plaintiff—Caſe ſaved upon this Queſtion, *viz.* "Whether the *Evidence* was *ſufficient* to ſupport the Verdict."

Mr. *Aſton* for the Plaintiff—The firſt Count is for Money lent and advanced by the Plaintiff, at the Defendant's Requeſt. And here is a Note under the Defendant's Hand produced,

produced, acknowledging the Receipt of it, and promiſing to be *accountable* for it: Which is tantamount to a Promiſe to PAY it. And its being added, "*on the Behalf of my* "*Grandſon*," makes no Difference: For There is *no Re-*
P. 374. " *medy* againſt the *Infant*. Therefore it is an *Original*, not a *Collateral* Undertaking. In 2 *Ld. Raym.* 1085. *Buckmyr* v. *Darnall*, It is agreed "That where no Action "will lie againſt the Party himſelf, Undertaken for, it is "an *Original* Promiſe." In the Caſe of *Reid* v. *Naſh*, *M.* 24 *G.* 2. *B. R.* and *Tr.* 1751, 24 & 25 *G.* It was ſettled accordingly. And here is *no Remedy againſt the Infant*, upon this Note.

2d Queſtion. Whether the other Evidence above ſtated was ſufficient to maintain the 2d Count.

Now the Plaintiff could not have maintained an Action againſt the Infant, for *this* Money, no more than for the former. The Plaintiff refuſed to advance it, till the Defendant wrote thus, "It is *my Requeſt* that You ſhall pay, "on the Account of Maſter *Hillier*, to Mr. *Davidſon*, to "the Workmens Uſe, 15l." And this is an *Original* Undertaking "that the Defendant will pay the Money:" And it was advanced on the Account and Credit of the Defendant.

Mr. *Nares contra* for the Defendant——

The Queſtion is, how far a general *Indebitatus Aſſumpſit* will lie, upon theſe Facts, and the Evidence brought to ſupport them. This is a general *Indebitatus Aſſumpſit*: And *Indebitatus Aſſumpſit* does not lie, but when an Action of *Debt* will lie. 1 *Salkeld* 23. *Hard's* Caſe is expreſsly ſo. 2 *Ld Raym.* 1034, 1035. *Smith* v. *Ayrey*: "*Indebi-*"*tatus Aſſumpſit* does not lie for Money won at Play." 1 *Strange* 680. *Welch* v. *Craig*: "It does not lie on a "Promiſſory Note." No more will it, upon a *Collateral* Undertaking. And therefore the preſent is *not a proper Count*, if the Evidence would ſupport it. This cannot be conſidered as Money *lent*. It cannot be more than Evidence of a *Collateral* Promiſe. And why will not an Action lie *againſt the Infant*? I think it *will*. And then it is exactly within the Caſes of *Buckmyr* v. *Darnall*, in 2 *Ld. Raym.* 1085; and *Reid* v. *Naſh*, Where *Naſh* promiſed to pay 50l. if the Plaintiff would withdraw his Record; (Which was indeed an Original Promiſe.)

Secondly, on the 2d Count—The Note only imports a *Certificate* "that the Money is *proper* to be paid." No general *Indebitatus Aſſumpſit* will lie upon this. Here is no Evidence of Money lent.

Mr.

Mr. *Aſton* in Reply——

1ſt. A Note of Hand acknowledging the Receipt, and promiſing to be accountable, it is certainly Evidence of Money *lent*. And it is every Day's Experience, that Notes of Hand are *given in Evidence* upon *General Indebitatus Aſſumpſits*. And as to inſerting "on Behalf of my Grand-"ſon" it makes no Sort of Difference. 2 *Strange* 955. *Thomas* v. *Biſhop*—The Addition of "Caſhier to the York "Buildings Company," was holden to make no Difference. And there is no Privity been Mr. *Harris* and the Infant: Nor will any Action lie againſt him. * P. 375.

This is *not* a Promiſe *in Aid*, or a *Collateral* Undertaking; but a *ſole*, *abſolute*, *Original* Promiſe. Therefore He prayed the *Poſtea* might be delivered to the Plaintiff.

Lord Mansfield——

The Queſtion is Whether there be *Evidence* of a Debt contracted by the Defendant, payable to the Plaintiff.

The Declaration conſiſts of two Counts, for two different Debts. And there cannot be clearer Evidence, than the firſt Note is, of the former Debt. And as to the 2d —Here is a Manſion-Houſe belonging to an Infant: Which Manſion-Houſe has a Garden belonging to it. It might *not* be *neceſſary* (in regard to the Infant's Situation and Circumſtances) to ſupport this Garden, (which might be a *Pleaſure* Garden:) And no Action will lie againſt the Infant *but* for *Neceſſaries*, It don't appear at all, that there could be any Remedy againſt the Infant.

You can bring an *Indebitatus Aſſumpſit for the Debt*; and *give the Note in Evidence*: And ſurely it ſupports the Declaration.

This is ſaid to be a *Collateral* Undertaking. But the Argument about Original or Collateral Undertakings, depends merely upon the Want of ſufficiently defining the *Terms* "Original" and "*Collateral*:" Otherwiſe, there can be no Doubt about them. *This* is clearly an *Original* Undertaking. And the Jury have *found* theſe Notes to be *ſufficient Evidence* of the Debt: And it is indeed a Matter of *Fact*, rather than of *Law*.

Mr. Juſt. Denison concurred. ——

Surely

Surely, This Note is *Evidence* of Money lent. And between the Plaintiff and Defendant, this is certainly an *Original* Undertaking: And the Money was paid at the *Defendant's Requeſt*. And there is no Privity between the Plaintiff and the *Infant*. The Cauſe of *Reid* v. *Naſh* is, in ſome Meaſure, like this. † Here is Nothing like a Collateral Requeſt or Promiſe: 'Tis an *Original* Undertaking.

† [And that Caſe was determined upon mature Conſideration.]

*P. 376. * Mr. Juſt. FOSTER likewiſe concurred——

The *Infant* was *not liable*, and therefore it *could not* be a *collateral* Undertaking. It was an *Original* Undertaking of the Defendant, to pay the Money.

Per Cur.' Let the POSTEA be delivered to the PLAINTIFF.

Hammond *verſ.* Brewer.

THIS was a Caſe for the Opinion of the Court, from the *Suſſex* Aſſizes, before Mr. Baron *Smythe*.

The Caſe ſtates, that an Act of Parliament was made in 26 *G.* 2. (*c.* 54.) for repairing and widening the Road from *Flimwell Vent* in the Pariſh of *Ticehurſt* in the County of *Suſſex*, to the Town and Port of *Haſtings* in the ſaid County: And it ſtates many other Matters not worth noting; as the ſingle Queſtion was "Whether the "TOWN *of Battel* was meant to be *included* or *excluded*."

The Queſtion aroſe upon that Part of this Turnpike-Act which gave Directions for repairing the Road *to* and *from* the Town of *Battel*; which Town was ſtated to be lately *paved*, before the Act of Parliament, by the Inhabitants; and that it was *kept in repair by them*, and *is now ſo*.

Note, In many other Parts of the Act, the Roads are deſcribed as leading from to *and* THROUGH ſuch and ſuch Towns: But when it mentions the Town of *Battel* it only ſays "TO and FROM it," but *omits* the Word "THROUGH." And the only Queſtion was "Whether the Act intended to INCLUDE or EXCLUDE the "Town of *Battel* itſelf."

Mr. *Knowler* was for the Plaintiff (of whom the Toll had been taken:) And Mr. *Harvey*, for the Commiſſioners, (the Defendant having acted by their Authority;) who had ſet up a Turnpike in the *very Heart* of the Town.

The

The COURT were clear that the Act of Parliament intended to EXCLUDE the Town of *Battel*; And that it was right and reasonable that it should be excluded.

And LORD MANSFIELD observed that it was neither usual nor convenient to erect Toll-Gates in the *Middle* of great *Towns; (Which these Commissioners had done:) Which might obstruct the necessary Intercourse amongst the Inhabitants; or even hinder an Inhabitant from sending his *Horses to Water*, without paying the Toll. Therefore They Ordered the

* P. 377.

POSTEA to be delivered to the PLAINTIFF.

Rex *verſ.* Manning.

Wedneſday, 22d June 1757.

MR. *Aſton* ſhewed Cauſe againſt quaſhing an Order of Seſſions made upon a Road-Act of 29 *G.* 2. *c.* 67. (for enlarging the Terms and Powers granted by former Acts:) Whereby the Surveyor of the Highways beyond *Sheppard Shord* and the *Devizes &c*, is authorized and impowered to *dig Gravel &c*, or any other Materials *&c*, in upon or out of and from all and every the Lands Fields or Grounds in the *Occupation* of *John Manning* in the Pariſh of *All Cannings* in the County of *Wilts*.

The Subſtance of the Order was as follows—It begins with reciting the Act of 20 *G.* 2. *c.* 67, impowering the Surveyor or Surveyors of the Highways or Roads therein ſpecified, or any other Perſon or Perſons appointed by him or them, (having firſt an Order from the Quarter Seſſions; *Six Days Notice, in Writing*, of the Application for ſuch Order, being firſt given *by the Surveyor* or Surveyors, *to the* OWNER OR OWNERS, *Occupier or Occupiers* of the Lands and Grounds then intended or purpoſed to be cut digged or gathered for Materials for repairing and amending the Highways or Roads, or left at his or their Places of Abode;) to cut dig gather take and carry away any Furze Heath Gravel Sand or other *Materials proper and ſufficient* for repairing of the ſaid Highways or Roads, (*if* ſuch Materials cannot be had or found in or upon any Waſte or common Grounds in any Pariſh Town or Place adjoining to or lying near the ſame Highways or Roads,) in upon or out of and from ANY *Lands, Fields or Grounds or either of them* (not being a Yard Garden Orchard Park Paddock Wood Coppice Nurſery or incloſed Ground planted with any Walk or Walks of Trees or Avenue to any Houſe;) paying ſuch Rates for ſuch Materials, or for the Damage done to the OWNERS AND *Occupiers* of the

the Ground where any and from whence the ſame ſhall be cut digged gathered taken and carried away, or over which the ſame ſhall be carried, *as the* SURVEYOR *or* SURVEYORS, *or* OTHER *Perſon* or Perſons by them appointed or to be appointed by Virtue of the ſaid former Acts or the ſaid recited Act, for that Purpoſe, ſhall *think reaſonable.*

* P. 378. *Then the ſaid Order of Seſſions recites, That Application had been made to that Court, *by* THE *Surveyor* of the ſaid Highways or Roads, for an Order to cut dig gather take and carry away Furze Heath Stones Gravel Sand or other Materials proper and ſufficient for repairing of the ſaid Highways or Roads, in upon or out of and from ALL *and* EVERY the Lands Fields *and* Grounds *now in the Occupation of John Manning* of the Pariſh of *All Cannings* in the ſaid County of *Wilts* Yeoman, (not being a Yard Garden Orchard Park Paddock Wood Coppice Nurſery or incloſed Ground planted with any Walk or Walks of Trees or Avenue to any Houſe.)

Then the Order goes on thus—

And the ſaid Surveyor having made and given *full Proof* to this Court " that *ſix Days Notice in Writing*, of his intend- " ed Application to this Court for ſuch Order, hath been " given by Him TO *the ſaid* JOHN MANNING, *or left* at *his* " Place of Abode;" *And the ſaid* JOHN MANNING, in Conſequence thereof having *offered to this Court by* HIS *Counſel*, Reaſons againſt ſuch Order being made; and endeavoured to ſupport the ſame by Proofs, (*Which Reaſons and Proofs this Court* ADJUDGE *to be very inſufficient*;) And the ſaid Surveyor alſo having made and given *full Proof* to this Court, " that PROPER *and* SUFFICIENT *Materials* for repairing of " the ſaid Highways or Roads *cannot be had or found* in or " upon any Waſte or Common Grounds in any Pariſh Town " or Place adjoining to or lying near the ſame Highways or " Roads."

THIS COURT doth therefore, in purſuance and by Virtue of the ſaid recited Act of Parliament unanimouſly Order that the ſaid Surveyor of the ſaid Highways or Roads, *or* ANY other Perſon or Perſons by Him appointed and employed, may, And He and they is and are (by virtue of the ſaid Act of Parliament and by virtue hereof) authorized and impowered to cut dig gather take and carry away any Furze Heath Stones Gravel Sand or other Materials *proper* and ſufficient for repairing of the ſaid Highways or Roads, in upon or out of and from ALL *and* EVERY the Lands Fields or Grounds *in the Occupation of the ſaid John Manning, in the ſaid Pariſh of All Cannings*, (not being a Yard Garden Orchard Park Paddock Wood Coppice Nurſery or incloſed Ground planted with any Walk or Walks of Trees or Avenue

nue to any Houſe,) *Paying* SUCH Rates for ſuch Materials, OR for the Damage done to the *Owners* OR *the ſaid Occupier* of the ſaid Lands where any and from whence the ſame ſhall be cut digged gathered taken and carried away, AS *the ſaid* ACT OF PARLIAMENT herein before in part recited DOTH DIRECT AND PRESCRIBE.

* Mr. *Norton*'s Objections to this Order upon making the Original Motion, were only *two*. * P. 379.

1ſt. That there ought to have been *Notice to the* OWNER, as well as to the Occupier of the Land wherein the Gravel was to be dug: Although He owned, that the ſtrict *Words* of the Act had not the *Copulative*, but only the *Disjunctive*; *viz.* upon Notice, *&c*, "to the Owner *or* Owners, Occu-"pier *or* Occupiers of the Land, *&c*." Yet, He ſaid, that Juſtice required, that the OWNER *ſhould have Notice, as well* as the Occupier; when *his Property* is to be ſo *materially affected*: And He argued this to be the *Intention* of the Act. And 'tis frequent, in ſuch Caſes, to underſtand *negative* Conjunctions AS *Copulative*.

2dly. The *Satisfaction* is directed by the Act to be made *both* to Owner AND Occupier: Whereas they have here awarded NONE at all to the *Owner* of the Land, who is the Perſon principally injured. Upon this Motion, a Rule was made to ſhew Cauſe. After which, 9 additional Objections were given in, in Writing.

Mr. *Aſton* ſhewed Cauſe why the Order of Seſſions ſhould not be quaſhed.

1ſt. Objection (given in in Writing) is, that the *Name* of the Surveyor who applied for the Order is not mentioned.

Anſwer—That is *Not Neceſſary*.

2d. Objection.—That the Seſſions have *not* ADJUDGED "That ſix Days *Notice* in Writing was *given to any* Perſon, "of the intended Application:" The Words are only, "The Surveyor *having* made and given full Proof to this "Court," that ſuch Notice was given.

Anſwer—That it *does appear*: But if not, yet it is *not neceſſary*.

3d. Objection. That the Fact of ſuch Notice being given, is *not ſufficiently ſet forth*; it being only ſaid "That ſuch No-"tice was given to *Meaning*, OR *left at his Place of Abode*."

Anſwer—That that *is* ſufficient.

4th.

4th. Objection: (which was Mr. *Norton's* firſt.) It is not ſet forth that ſix Days Notice in Writing of this intended Application was given to the OWNER of the Lands.

Anſwer. Notice to the OCCUPIER is enough. So, on a Diſtreſs—Notice may be given *either* to the Tenant *or* to
* P. 380. * the Owner of the Goods. 4 *Mod.* 390. *Walter* v. *Rumball* is ſo holden by the Court. [*pa.* 395.] And here the Owner may perhaps *not* be intitled: For the Act ſays, "That the "Damages, IF *any* &c." Beſides the Owner may be at a vaſt Diſtance from the Land. And here the *Tenant appeared*, and made what Defence he thought proper.

5th. Objection. That the Seſſions have *not exxpreſsly* ADJUDGED "That proper and ſufficient Materials for repair-"ing the Highways were NOT *to be found in any* Waſte or "Common Ground *in any Place near* the ſaid Highway:" For it is only ſaid, The Surveyor *having* made and given "full Proof to the Court that, &c."

Anſwer—The Order is agreeable to the Act of Parliament: And it ſpecifies "that *full Proof* was made and given "to the Court of this Fact."

6th. Objection. That it is not ſet forth "That NO *proper* "*Materials* AT ALL, *for* repairing the Highways, are to be "found in any ſuch Waſte or Common Ground:" But only (in looſe and general Words) "That PROPER and "SUFFICIENT Materials for ſuch Purpoſe are not to be "found there." Notwithſtanding which, It is ordered, "that the Surveyor ſhall cut and carry away ALL *Sorts* of "Materials neceſſary for the Repair of the *whole* Road,"

Anſwer—That it is exactly agreeable to the Act.

7th. Objection. *Non conſtat* that *any Materials* proper for ſuch Purpoſe ARE TO BE FOUND *in any Part* of theſe Grounds.

Anſwer—That muſt depend upon *Trial*. The Lands are to be "cut, digged, and gathered *for* Materials."

8th. Objection. 'Tis not ſet forth *how far* theſe Grounds *lie from the Highway*; nor *to what Diſtance* all *waſte* Grounds have been found barren of proper Materials; nor that theſe Grounds are *nearer* than any *Waſte* where ſuch Materials *may* be found.

Anſwer—The Order is worded *agreeable to the Act*: And theſe Particularities *need not be inſerted* in it.

9th.

9th Objection. That the *Powers* here committed to the Surveyor are *uncertain* in every Branch thereof. For *only* that PARTICULAR *Piece* of Land which affords the Materials, is made liable by the Act. But here ALL the Grounds in the Occupation of *Manning*, (being as he alledged, a Farm of 540l. *per Annum*) are to be dug at the Diſcretion of the Surveyor. And they are alſo laid under perpetual Incum-
* brance, or at leaſt one that is abſolutely uncertain; for * P 381.
that *no Time* is prefixed at which ſuch Grounds ſhall be emancipate.

Anſwer—This alſo is ſufficient; being agreeable to the Act.

10th Objection; (Which was Mr. *Norton*'s Second) That *Satisfaction* for ſuch Materials is, by this Order, awarded to the Owner OR Occupier, but *not* BOTH; Nor is it certainly defined to *which* of them: Whereas the Act of Parliament is, expreſs, "Paying to the Owners AND Occupiers."

Anſwer—'Tis ſufficient: The Act is disjunctive, in directing the Notice; and muſt here be taken *disjunctively* and *reſpectively*.

11th. Objection. That the RATE *of ſuch Satisfaction* is eſtimated in the Order, only as for the *Value of the Materials* which ſhall be cut or carried out of theſe Grounds; OR for the *Damage done thereby*; but *not* as for BOTH, as it ought in Juſtice, to be: nor is it certainly defined, for WHICH of the two, the Compenſation is to be made.

Anſwer—'Tis in the *Words* of the Act.

Mr. *Norton* and Mr. *Thurlow*, in Reply, ſupported the eleven Objections: And urged that theſe ſummary Authorities given to Juſtices, to the Detriment of the Liberty or Property of the Subject, ought to be STRICTLY *purſued*: And they cited many Caſes, of what they apprehended to be ſimilar Inſtances, or at leaſt proceeding upon the ſame Principles. Whereas in the preſent Caſe, the Juſtices have not (as they alledged) given themſelves *Juriſdiction*, by any ADJUDICATION of the neceſſary Facts: but have *only recited the* EVIDENCE of them.

Lord MANSFIELD—ſaid this Order was very ill penned; and the Juſtices ought undoubtedly to purſue their Authority: But, however, He did not agree to *all* the Objec- * § The 2d.
tions; and particularly to the * 2d. and § 5th. which are and 5th. of
founded upon a ſuppoſed Neceſſity that there muſt be *expreſs* thoſe given
Adjudications; where the Recitals and Allegations are ſuf- in Writing.
ficient, and where Concluſions are actually drawn.

As to the 4th Objection—He did not think that the Act could mean that it ſhould *always* be neceſſary to give *Notice to the* OWNER; Which might be impoſſible.

But as to the 6th and 7th Objections—It IS *neceſſary to ſhew* that there were NO proper Materials to be found in or upon the Waſtes or Common Grounds *near* the Highway.
* P. 382. * Which is *not done* here. And they are not warranted to dig in the private Soil for ALL *the Species* of Materials; *becauſe* SOME *of theſe Species* are not to be found in or upon the ſaid Waſtes or Common Grounds. They ought to SPECIFY what *can* NOT be found in or upon the *Waſtes* or Common Grounds; and what *may* be found *in the private* Soil. And they can *not* dig, to TRY for it, in the *private* Soil: They ſhould previouſly *know* that it is to be found there; or *at leaſt*, have a reaſonable Proſpect of finding it there.

5th. And they cannot make this *general* Order "to *dig* "*over* ALL *the Eſtate*;" and leave this to the *Diſcretion of the Surveyor:* They ought to *fix* upon the *particular* Part; to determine this *themſelves*, and not leave it to their Surveyor. THIS Objection is FATAL.

10th. So alſo is that of the *Satisfaction:* For the SATISFACTION *ought to be awarded* to the Owner, or to the Occupier, or to Both; ACCORDING *to the* DAMAGES ſuſtained by the One, *or* by the Other; *or* by Both.

Perhaps ſome *other* Objections might hold: But however, here is *enough*, that I have *already* mentioned.

Mr. Juſt. DENISON—It is a very imperfect Order, and liable to many Objections.

As to the 2d, 3d, 5th, 6th, and 7th, Objections—An *expreſs* and *direct* ADJUDICATION may *not* be neceſſary: But many of theſe Foundations or their Authority ought, *ſome how or other*, to APPEAR *upon the Face* of the Order. Particularly, it ought to appear that *Notice* was given of the Intention to dig in ſome *particular Place:* For perhaps very good Cauſe may be eaſy to be ſhewn againſt it. But

9th. It can never be right to dig over ALL *the Eſtate*;

6th. Nor to dig in the private Soil for *ſuch* Materials as *may be found* in the Waſte.

As

As to the 4th—NOTICE is *not* univerſally neceſſary to be given to the *Owner*: This may in ſome Caſes be *impracticable*.

But as to the 10th. *Satisfaction* ought to be made *to the Owner*, (if he be damaged) undoubtedly.

Mr. Juſt. FOSTER concurred.

The Perſon that drew this Order, has kept to the WORDS, but *not to the* SPIRIT of the Act.

* And as to the 9th Objection in particular, undoubtedly, The Juſtices have exceeded their Power in ordering the *Surveyor to dig* over the WHOLE *Eſtate*: *This* can never be reaſonable, nor within their Juriſdiction. * P. 383.

Per Cur. unanimouſly,
RULE for quaſhing the ORDER
MADE ABSOLUTE.

Cogan *verſus* Ebden and Another.

Thurſday, 23 June 1757.

ON a Motion (made the 18th Inſtant) To *ſet aſide a Verdict* as being given in by the *Foreman*, CONTRARY to the Opinion and Intention of EIGHT *of the Jury*.—It appeared that the Defendant juſtified under a Right of a Way, over the Plaintiff's Ground, to *two* Cloſes of the Defendant, *viz. Broadmoor*, and *Three-Acres*: Upon which, *two different Iſſues* were joined; *viz.* One, upon the Right of a Way to *Broadmoor*, the Other, upon the Right of a Way to the *Three-Acres*. And the Foreman gave in the Verdict, as a *general* Verdict for the Defendant, upon *both* Iſſues. But *Eight* of the Jury made *Affidavit* "That it was the "*Meaning and Intention* of the *whole Jury*, to find the "former Iſſue for the Defendant; and the *Latter* for the "*Plaintiff*: And that this Miſtake was diſcovered by "them, *an Hour afterwards*; but not till the *Judge was* "*gone* to his Lodgings." And upon the Judge's Report it appeared that, though there was indeed Evidence on *both* Sides, yet the *Weight* of the Evidence was (as it appeared to Him) on the Side of the Plaintiff, as to this latter Iſſue.

N. B. The Foreman had declined making any Affidavit: becauſe, he ſaid, he ſhould make himſelf appear a Fool, to the Court of King's Bench.

This Matter was much litigated by the Counſel on both Sides. And the Counſel for the Plaintiff mentioned the Caſe of *Baker* v. *Miles*, in *C. B.* in *M.* 4 *G.* 2. S. P. where Eleven of the Jurymen ſwore "That the Foreman had miſtaken their Verdict;" And it was thereupon ſet aſide. §

§ V. Viner's Abr. Title Vrial, p. 483. pl. 12.

The COURT were All clear that this was a *Miſtake*, ariſing from the Jury's being unacquainted with Buſineſs of this Nature; and from the Aſſociate's Omiſſion in not aſking the Jury particularly "how they found *each reſpective* "Iſſue," and in not making the Jury fully *underſtand* their own Finding: And that it was agreeable to Right and Juſtice, that, the *Miſtake ſhould be rectified*. And they had no Doubt about the *Fact* of this Miſtake; from the Affidavit of the Eight Jurymen, *confirmed* (as they held it in Effect to be) by the Foreman's declining to make any Affidavit at all: Eſpecially, as the Judge's Notes ſhewed the Weight of the *Evidence* to have been for the Plaintiff, as to this latter Iſſue.

. P. 384.

And Lord MANSFIELD and Mr. Juſt. DENISON thought that, as it was a *mere Slip*, there might be *ſome* Method of *Rectifying the Verdict* according to the Truth of the Caſe; from the Judge's Notes, if they were ſufficiently particular; *without ſending* the Iſſue to be tried over again, at a great Expence.

And the Caſe of *Newcombe* v. *Green*, in 2 *Strange* 1197, was mentioned; where the *Poſtea was* amended by the Judge's Notes. And Lord *Mansfield* ſaid that, at leaſt they could ſet aſide the Verdict *without Coſts*. But Difficulties occurring how the Coſts would be, in ſuch Caſe; as *One* Iſſue was ſtill found for, and was in Truth clearly for the Defendant. Therefore

CUR. ADVIS'.

And now Lord MANSFIELD, ſeeing Mr. *Morton* in Court, who was concerned for the Plaintiff, and had (on his Behalf) moved to *ſet aſide* the Verdict, took Occaſion to mention this Caſe: and ſaid they had thought of it; and He had talked with his Brother ‡ *Wilmot* too, about it: But, however, He was not now going to give any Opinion; but only to *propoſe* what ſeemed to Him the moſt *proper Method* of coming at it.

‡ [Whoſe ordinary Engagements were now in the other Court.]

The Caſe of *Newcombe* v. *Green*, itſelf, is not applicable to this Caſe. But there is another Caſe, of *Mayo* v. *Archer*, in 1 *Strange* 514, 515, Where the Queſtion was "Whether a Farmer who bought and ſold Potatoes could be a "Bankrupt:" And the ſpecial Verdict did not ſet forth the *Quantities* he had bought and ſold; though they were *proved at the Trial*. The Court did not there award a *Venire facias de novo*; but *amended* the Special Verdict, in that reſpect. Which Caſe is more applicable to the preſent Caſe, than

than that which was cited: For here they Ordered the Special Verdict to be amended; though the Plaintiff's Motion was only "that a *Venire facias de novo* might be "awarded."

But another Case has been mentioned to me, which is applicable to the *Principle* of this Case; though not like the particular Fact. It is that of *Dayrell* v. *Bridge*, *Tr.* 22 *G.* 2. *B. R.* Trespass for cutting down an Oak-Tree—The Defendant pleaded several Pleas; One of which was, "Not Guilty." At the Trial, a *General* Verdict was taken down, and so entered. And the Court *rectified the Verdict*, by expunging the Finding on all but the "Not Guilty;" * It appearing that Nothing was in Question (at the Trial) but "whether the Place where the Tree stood, was Parcel "of the Manor, or not." In the Case of *Newcombe* v. *Green*, several Cases † were cited on the same Subject: Though the Case *itself* is not the present Case.

* P. 385.

† None are mentioned by *Strange* Pa. 1197. But *Cro. Car.* 338, *Eliot* v. *Skypp*, 1 *Salk.* 53. *Bold*'s Case, and a Case of *Fry* v. *Horder*, in Lord *Raymond*'s Time, were cited.

If the Court sets the Matter right, they should proceed according to the *whole* Truth of the Case. The Judge who tried the Cause agrees to the Fact disclosed in the Affidavit of the *Eight* Jury-Men: Whereas Your *first* Affidavit on which the Rule was made, was an Affidavit of only *Four* of them.

Therefore what I would propose is that You should make your Motion, and have a Rule to shew Cause, Why, upon Reading the Affidavit of these *Eight* Jury-Men, the Verdict should not be AMENDED *and* SET RIGHT, *according to the Truth of the Finding*.

Note—Such a Motion was afterwards made; and a Rule to "shew Cause" granted. But it never came before the Court any more: It plainly appearing that the Court, upon Deliberation among themselves, had come to an Opinion "that in this Shape the Verdict *might* be set "right."

Rex *verf.* Goddard Williams.

Tuesday, 28 June 1757.

MR. *Nares* shewed Cause (on *Wednesday 9th Feb.* last,) against quashing a *Certiorari* to remove, from the Quarter-Sessions of the City of *London*, an Information upon 1 *Jac.* 1. *c.* 22. intitled "The Duty of Tanners, Curriers, "Shoemakers and of others Cutting of Leather."

Note. The Information runs, throughout, "that the In-"formers give the LORD MAYOR of *London* to under-"stand &c." But the *Certiorari* is directed to the SESSIONS of the City of *London*.

Three

Three Objections, he ſaid, had been (upon the original Motion) taken to this *Certiorari*:

Obj. 1ſt. The *Certiorari* does *not lie*, at all.

2d. 'Tis *not well directed*. [*V. infra*, & 1 *Jac.* 1. *c.* 22. § 50.]

3d. It does *not lie*, BEFORE *Conviction*. 1 *Salk.* 145. Dr. *Sands*'s Caſe. 1 *Siderf.* 296.

*P. 386. * Anſwers—

As to the 1ſt Objection— 1 *Ld. Raym.* 469. Dr. *Groenvelt*'s Caſe proves that a *Certiorari* will lie: For this Court, by *Common Law*, may iſſue it. 1 *Salk.* 148. *Croſs* v. *Smith*. A *Certiorari* lies to *All Inferior* Juriſdictions. 1 *Ventr.* 68. *Smith*'s Caſe is to the like Effect. *Style* 351 & 356. in Point. 8 *Mod.* 331. ‡ *Arthur* v. *Commiſſioners of Sewers in Yorkſhire*. 1 *Hawk. P. C.* 218. § 79, 80. is very ſtrong in Favour of *Certioraries*, where the Inferior Juriſdiction exceeds its Authority.

[‡ A miſerably bad Book, intitled "Modern Caſes in Law and Equity."]

2dly. It is *directed* to the Juſtices at Seſſions, *generally*. And it is right: For this is an *Act of Seſſions*. 2 *Hawk. P. C.* 290. § 43. proves this Method to be right.

3dly. As to 1 *Salk.* 145. *pl.* 5. Dr. *Sands*'s Caſe, *P.* 10 *W.* 3. The Reaſon given for the Opinion is anſwered by the very next Caſe (*pl.* 6.) in the ſame Book. The Caſe in 1 *Siderf.* 296. [There are two Caſes there, in the ſame Page, *pl.* 19. & *pl.* 20. *Tr.* 18 *C.* 2. which both ſeem applicable to this Subject.] ſtands upon its own Bottom. And perhaps the Method mentioned in 1 *Salk.* 145. *pl.* 6. was not then found out. However, notwithſtanding what is there ſaid, Yet it will lie to every *Quarter-Seſſions*: And this was at the Quarter-Seſſions.

Mr. *Norton contra*, for the Rule (to quaſh the *Certiorari*) agreed to put it upon 1 *J.* 1. *c.* 22. § 50. which Clauſe gives Juriſdiction to the Lord Mayor of *London* for the Time being, within the City, AND *within Three Miles Compaſs of it*.

And this Information is here given to the LORD MAYOR, *preſent* (it is true) *in Court* of the aforeſaid Court of Seſſions. And the Informers pray the Judgment *of the* LORD MAYOR; though it is indeed added "*ſo preſent in the ſaid* "*Court*." Therefore this is NOT a Proceeding AT *Seſſions*; but a Proceeding *before the Lord Mayor* purſuant to the Act.

Note

Note—The Caption is AS *at a Court of Seſſions:* But the Information is given TO the *Lord Mayor*; And they conclude with *praying Judgment* of the LORD MAYOR, *ſo preſent in that Court* (of Seſſions.)

LORD MANSFIELD—The *Certiorari* has manifeſtly iſſued, as *ſuppoſing* it to be a *Proceeding* BEFORE *the* JUSTICES *at the Seſſions:* And *they return* it *as ſuch.*

* *N. B.* The Return is by "*Stephen Theodore Janſſen* * P. 387. "Eſq; *Mayor* of the City of *London*, and ALSO *one of* "*the Juſtices* within written."

The COURT thought, the PREVIOUS Queſtion to that of the Regularity or Direction of the *Certiorari*, depended upon the Propriety and Validity of the *Information*; *viz.* "Whether the *Mayor* ALONE had the Juriſdiction, under this Act;" *or* "the *Mayor* IN SESSIONS."

Mr. *Norton*—The Juriſdiction is in the *Mayor* ALONE: For he has it even for the Space of 3 *Miles out of the City*; where the Seſſions have NO *Juriſdiction at all.* It is true that He has here *executed* this Juriſdiction IN Seſſions.

LORD MANSFIELD and Mr. Juſt. DENISON were ſatisfied that the *Propriety* of the DIRECTION *of the Certiorari*, depends upon the *Propriety* of the *Conviction:* And they ſeemed to think that the *proper Method* of bringing this Queſtion before the Court, would be for Mr. *Nares* to move "to "QUASH *the Information.*"

Mr. *Nares* deſired to take a Day or two's Time, to conſider of this, and to be better prepared for it. Whereupon it was, at preſent, ADJOURNED.

And on *Monday* 23d *May*, the preſent Rule was *enlarged:* And alſo Mr. *Nares* (by Approbation of the Court, and of the adverſe Party,) took a Rule, agreeable to the above Hint, "to SHEW CAUSE why the INFORMATION ſhould "not be *quaſhed.*"

And now Mr. *Norton* and Mr. *Williams* being ready to ſhew Cauſe, *pro Rege*;—

Mr. *Gould* and Mr. *Nares*, for the Defendant, propoſed their Objections, to the *Information*, thus; *viz.*

1ſt. That the Juriſdiction is not in the LORD MAYOR; but in the *Seſſions.*

2dly.

2dly. The Remedy is NOT *by way of* INFORMATION; but ought to be by *Indictment*.

First—They ſaid that the Queſtion turned upon 1 *Jac.* 1. *c.* 22. § 29, 32, 33, 46, 60. They inſiſted "That the "Lord Mayor had no Authority, by this Act, to appoint * P. 388. "* Triers, where the Leather is made and manufactured "*into Wares*;" And conſequently that as this Leather appeared to have been manufactured into Wares, *viz.* into Saddles, the Lord Mayor had *no Juriſdiction* to proceed in this ſummary Way: But that

Secondly—The Proceeding ought to have been *by Way of Indictment*; and not by way of Information, which is no Common-Law Proceeding. They added

Thirdly—

That it is uncertain before WHOM the Information is taken.

If it be underſtood as taken before the Lord Mayor, *He* has *no Juriſdiction*, for the Reaſons abovementioned: But *If* it be underſtood as taken before the Seſſions, it ought (as has been ſaid) to have been by *Indictment*. Whereas it is a Rule, that Informations ought to be at leaſt as certain as Indictments. So is 2 *Hawk. P. C. pa.* 261. *c.* 26. § 4.

Mr. *Norton*, Mr. *Williams* and Mr. *Lucas*, for the Proſecution—anſwered, That this is an Information brought by the Warden of the Sadlers Company, under this Act of Parliament, of 1 *J.* 1. *c.* 22. And

Anſwer to the 3d Objection. It is not at all uncertain; But is an Information exhibited to the *Mayor* ONLY; and prays the *Judgment* of the *Mayor only*.

Anſwer to the 1ſt Objection. And the Act gives him Juriſdiction, *as well* where the Leather is manufactured, as where not. And this is a Proceeding like the Informations in the Exchequer, *in Rem*, for a Condemnation.

Anſwer to the 2d Objection. It is *not* before the *Seſſions*. So that this Objection of its not being by way of Indictment is out of the Caſe.

Moreover, They urged that the Court would NOT *quaſh* ſuch an Information, upon *Motion:* Eſpecially, where a PRIVATE PERSON is *intitled to the Penalty*; and none of it belongs to the Crown.

Lord MANSFIELD—As to the Court's NOT *quaſhing on* MOTION, but putting the Party to *demur*—That Reaſoning does

does hold, *where the Objection* is to the JURISDICTION of the Court that has undertaken to proceed.

Now here the Queſtion is upon the *Juriſdiction*.

* This is agreed by Mr. *Williams* and Mr. *Norton*, to be a Proceeding before the Lord Mayor PERSONALLY, though IN *Seſſions*. But the 50th Section (which gives Him the Juriſdiction,) does *not* give it to Him PERSONALLY; but in *the Terms* of the common Commiſſion of *Oyer and Terminer*: And the *ſame* Power is given to *Him*, as to the *other* Mayors, Bailiffs, Head-Officers of Boroughs, Stewards of Leets &c. Now this muſt be exerciſed *according to the Courſe* of the *Common* Law; i. e. *by* INDICTMENT. *P. 389.

But it is objected "That the *Seſſions* cannot have Juriſ-"diction *beyond the Limits of the City*:" Whereas this is given to the Mayor in any Place within 3 *Miles* of it.

The Anſwer to this is, "That this Juriſdiction of the "*Seſſions* is *therefore*, by this Act, *extended* to 3 Miles be-"yond the City."

The Parallel does not hold, with regard to Informations *in rem*, in the Exchequer; (to which it has been compared.) For that Proceeding in the Exchequer depends upon the *Courſe* of the Court of Exchequer: And it is neceſſary there. For it is not there known, *Who* will claim; nor does it affect the *Party*: And the Perſon who owns the Goods may not perhaps be in Court, or may be unknown, or may not have other Opportunity to come in and claim. This is an ancient Courſe there; as ancient as the *Court* of Exchequer itſelf, and by *Common* Law.

But here is no Sort of Incongruity, in the preſent Caſe, in the *Goods being forfeited by* the *Party*'s being *convicted* of the Offence, upon an *Indictment*. And here is no Colour for the Notion of a *ſummary Juriſdiction* in the Mayor, under the Authority of this Act of Parliament. Therefore the Information ought to be quaſhed, for *want of Juriſdiction* in the Mayor, to receive and proceed upon it.

Mr. Juſt. DENISON concurred. And he agreed with LORD MANSFIELD that there was *no Need* to put them to *demur*, in a Caſe where there is *Defect of Juriſdiction*: And cited a Caſe of *Rex* v. *Weſley*, on his own Motion, in Perjury; where the Seſſions had no Juriſdiction; And therefore the Court quaſhed the Indictment.

And

And as to the *Juriſdiction*—He concurred with Lord *Mansfield*; and (at large) gave the ſame Reaſons, drawn from the 50th Section of this Act; which he ſaid, manifeſtly conſidered the Mayor, merely as the *Head* of his Corporation*; and did *not* intend to give Him a *ſummary* Juriſdiction, PERSONALLY. Conſequently, they muſt proceed in the *ordinary* Way; that is, *by Indictment*.

* P. 390.

And this very Act of Parliament *gives the Seſſions* the *extended Juriſdiction* as far as within 3 Miles Compaſs of the City: For if it *gives the* END, it muſt be conſtrued to give the *Means* too.

And it is *not like* the Proceedings *in rem*, in the Exchequer. For the Juſtices here may give the Forfeiture, undoubtedly, *upon an Indictment*, (after Conviction.)

This *Information* therefore ought to be *quaſhed*: as it appears that the Lord Mayor, PERSONALLY, had *no ſuch Juriſdiction*.

Mr Juſt. FOSTER concurred. He held that the 50th Section did *not* give the Juriſdiction to the Mayor PERSONALLY, and in a *ſummary* Way; but as the HEAD *of a Court*: And He ſaid that the whole Clauſe (taken together) plainly ſhews this. Therefore the Proceeding ought to be in the ordinary Courſe, *viz.* by *Indictment*. And if they have *proceeded* WITHOUT *Juriſdiction*, they ought to be ſtopped: and the Information may be *quaſhed upon Motion*: For as there is *no Juriſdiction*, the REASON *does not hold* for putting the Defendant *to* DEMUR; but We may in *ſuch* Caſe, very properly quaſh, *on Motion*. Conſequently, this Information, being of this Kind, ought to be quaſhed.

Per Cur. unanimouſly—RULE for quaſhing the Information made abſolute: And the former RULE (prayed for quaſhing the *Certiorari*) DISCHARGED.

Wedneſday, 29th June 1757.

Bright, Executor of Hannah Criſp, Widow, *verſus* Eynon.

(*Mr. Juſtice* Wilmot *was abſent*; *Sitting in Chancery, as One of the Lords Commiſſioners of the Great Seal.*)

THE Plaintiff's Counſel moved for a NEW TRIAL, upon Payment of Coſts: and obtained a Rule "to ſhew "Cauſe why this *Verdict* ſhould not be SET ASIDE, upon "Payment of Coſts."

Lord

Lord MANSFIELD ſaid that He did not chooſe, in any Cauſe tried before Him, to conclude the Matter by a ſhort Report, "that He was ſatisfied, or diſſatisfied, with the "Verdict." He would ſtate the Caſe particularly to the *Court; and reſerve declaring his Opinion of the Verdict, (which he had not yet intimated, either at the Trial or ſince,) till he had heard the Counſel on both Sides. * P. 391.

This was an Action upon the Caſe, brought by the Plaintiff, as Executor of *Hannah Criſp* Widow deceaſed, againſt the Defendant, upon a Promiſſory Note in the following Words (all of the Defendant's own Writing,) which was proved and read: "I acknowledge to have borrowed of Mrs. "*Hannah Criſp*, this 29th of *September* 1753, the Sum of 60l. "For which I promiſe to pay 5l. *per Cent. per Annum*, and "to be accountable for the whole, ſix Months after Notice "given for that Purpoſe. *John Eynon. September* 29th "1753."

The Defendant ſet up a *Diſcharge* by a Writing in the following Words: "I promiſe unto *John Enyon*, that, *in* "*Conſideration* of his paying unto Me, Intereſt for Sixty "Pounds He has of mine, during my Life, after the Rate "of 5l. *per Cent. per Annum*, that then the ſaid ſixty Pounds, "at my Deceaſe, ſhall be *His*, and his Note for the ſame "ſhall be *void* and of *none Effect*. Witneſs my Hand this "10th of *October* 1753. *Hannah Criſp*." The *Body* was all *his* own Hand: but he called two Witneſſes who ſaid they believed the *Name* ſubſcribed to be the Hand of the Teſtatrix: But their Knowledge of her Hand was very ſlight; One of them having only ſeen her ſign a Receipt.

He alledged that ſhe gave this Diſcharge, in Conſideration of a Marriage between him and *Rebecca Bright* his now Wife, (Siſter to the Plaintiff.)

He produced a Will, in his own Cuſtody, bearing Date the 11th of *Auguſt* 1753; by which the Teſtatrix had made the ſaid *Rebecca Bright* her Executrix and Reſiduary Legatee.

This Marriage was not till *May* 1754: The Teſtatrix died in *April*, 1756.

It came out, upon his own Evidence, that the Teſtatrix was not worth 200l. and that ſhe paid 5s. a Week or at the Rate of 13l. a Year, for her Board. He could make no Proof of the Conſideration alledged: The fartheſt that any of his Witneſſes went, was to ſay "that the Teſtatrix ſeem-"ed to approve the Match."

The

The Plaintiff, in Reply, inſiſted " that the Signature was " *forged.*" *Joſias Bright* ſwore, that the Defendant's Wife did not know the Defendant had borrowed any Money from the Teſtatrix, till after She was married. After ſhe was ac-
* P. 392. quainted with it, ſhe preſſed him to pay the Money, * out of a Legacy of 150l. from one *Sarah Hart*, which he received: For the Teſtatrix might call it in. The Defendant bid her not be uneaſy: " For I muſt have ſix Months Notice."

Several Witneſſes proved, that *Hannah Criſp*, about *Michaelmas* 1754, talked of calling in the Money upon this Note, and lending it to other Perſons.

That in 1755 and 1756, ſhe ordered Letters to be wrote to the Defendant, for the Money. When ſhe gave theſe Orders, ſhe produced the Defendant's Note, and ſaid " the " Intereſt was not enough to maintain her.

It was proved, that the Defendant entered a *Caveat* at *Doctors Commons* in *April* 1756; and when he found ſhe had made a Will in Favour of the Plaintiff, and conſequently revoked that which was in Favour of his Wife, He was very warm, and mentioned a Note from him to her; and declared he would not withdraw his *Caveat*, unleſs it was given up.

The Plaintiff examined no Witneſs, to ſay the Signature was not her Hand. By Way of Rejoinder, they called Witneſſes to the Defendant's Character; who gave him a good one.

The Defendant inſtructed his Counſel to ſay, that he always underſtood the Gift to be revocable by *Hannah Criſp* during her Life; but if ſhe did revoke or call in the Money during her Life, then the Debt was to be diſcharged.

The principal Queſtion made at the Trial was, " Whe-
" ther this latter Note was forged, or not. "And as to that, the two Witneſſes who believed it to be her Hand, were not oppoſed by any Witneſſes to the contrary: The Reaſon given, was, that the Plaintiff had no Opportunity of getting it inſpected.

His Lordſhip ſaid, He left two Queſtions to the Jury: (1ſt.) " Whether the Name of the Teſtatrix was 'orged';" (2d.) If they took it, upon the Evidence laid befo: them, to be her Hand, then " Whether it was not obtained by " *Fraud* and without her *knowing* the Contents and Effect " of the Writing ſhe ſigned."

The

The Jury found for the Defendant.

Lord *Mansfield* intimated nothing, then, as to his *own* Opinion of the Caſe; and profeſſedly avoided doing it now, till He ſhould have heard the Counſel.

* They were accordingly heard. And they who ſhewed Cauſe againſt the Rule, went very much at large into the *Propriety* and *Riſe* of Granting *New Trials*. They urged, that a Verdict ought to be *concluſive*, where Evidence of any Sort was given on *both* Sides. That the *Forgery* here was the *only* Queſtion: If the Plaintiff objected *Fraud* and *Impoſition*, He muſt go to a Court of *Equity* for Relief. * P. 393.

Lord Mansfield—Trials by Jury, in Civil Cauſes, could not ſubſiſt now, without a Power, *ſomewhere*, to grant new Trials.

If an erroneous Judgment be given in Point of *Law*, there are *many* Ways to review and ſet it right.

Where a Court judges of Fact upon *Depoſitions in Writing*, their Sentence or Decree may, *many* Ways, be reviewed and ſet right.

But a general Verdict can *only* be ſet right by a *new Trial*: which is no more than having the Cauſe more deliberately conſidered by *another Jury*; when there is a reaſonable Doubt, or perhaps a Certainty, that *Juſtice has not been done*.

The Writ of *Attaint* is now a mere Sound, in *every* Caſe: In *many*, it does not pretend to be a Remedy.

There are numberleſs *Cauſes* of falſe Verdicts, *without* Corruption or bad Intention of the Jurors. They may have heard too much of the Matter, before the Trial; and imbibed Prejudices, without knowing it. The Cauſe may be intricate: The Examination may be ſo long as to diſtract and confound their Attention.

Moſt general Verdicts include *legal Conſequences*, as well as Propoſitions of Fact: In drawing theſe Conſequences, the Jury may miſtake, and infer directly contrary to Law.

The Parties may be *ſurpriſed*, by a Caſe falſely made at the Trial, which they had no Reaſon to expect, and therefore could not come prepared to anſwer.

If

If *unjuſt* Verdicts, obtained under theſe and a thouſand like Circumſtances, were to be concluſive for ever, the Determination of Civil Property in this Method of Trial, would be very precarious and unſatisfactory. It is abſolutely *neceſſary to Juſtice*, that there ſhould, upon many Occaſions, be Opportunities of *reconſidering* the Cauſe by a new Trial. And it is done in a Way very favourable to the Parties for whom the wrong Verdict is given: It is, *upon* * Payment of *Coſts*. Whereas in *other* Caſes where a wrong Judgment is reverſed, Coſts are paid as if the right Judgment had been given in the firſt Inſtance.

* P. 394.

It is NOT *true* "that no new Trials were granted *before* "1655;" as has been ſaid from *Style* 466.

In *Slade*'s Caſes, *M.* 24 *G.* 1. (which was in 1648,) in *B. R.* reported in *Style* 138, The Court was moved for Judgment, formerly ſtayed upon a Certificate, made by Baron *Atkyns*, "That the Verdict paſſed againſt his Opinion." *Bacon* Juſtice ſaid, "Judgments HAVE BEEN arreſted in the "*Common Pleas, upon ſuch Certificates.*" *Hales*, of Counſel with the Defendant, prayed that the Judgment in that Caſe of *Slade* might be arreſted, and that there might be a *New Trial*; "For that it HAD BEEN DONE THERETOFORE, "in like Caſes." Indeed that Caſe, as there reported, repreſents *Rolle* Juſtice to hold "that it ought not to be "ſtayed, *though it have been done* in the *Common Pleas*: for "that it was too arbitrary for them to do it." And He adds "You may have your Attaint againſt the Jury; And there "is no other Remedy in Law for You: But it were good "to adviſe the Party to ſuffer a new Trial, for better Satisfaction."

In the Caſe of *Wood* v. *Gunſton*, *Michaelmas* 1655, *Banc. Sup. Style* 466, (which was an Action upon the Caſe, for ſpeaking ſcandalous Words of the Plaintiff, and a Verdict for the Plaintiff, with 1500l. Damages,) the Defendant moved for a new Trial. And *Glynn* Chief Juſtice ſaid "It "was in the *Diſcretion of the Court*, in *ſome* Caſes, to grant a "new Trial: But this muſt be a *judicial* and *not an Arbitrary* "Diſcretion. And it is FREQUENT IN OUR BOOKS, for the "Court to take Notice of the Miſcarriages of Juries and "*to grant new Trials* upon them. And it is for the *People's* "*Benefit*, that it ſhould be ſo: For a *Jury* may ſometimes "by indirect Dealings, be moved to ſide with one Party, "and not to be indifferent betwixt them; but it can not be "ſo intended of the Court." And in that Caſe, *a new Trial was ordered*, upon the Defendant's paying full Coſts; the Judgment ſtanding as a Security to pay what might be recovered upon the next Verdict.

The

The Reaſon why this Matter cannot be traced *further, back*, is, " that the Old Report-Books do not give any " Accounts of Determinations made by the Court upon " *Motions.*"

Indeed, for a good while after this Time, the Granting of new Trials was holden to a Degree of *Strictneſs*, ſo intolerable, that it drove the Parties into a *Court of Equity*, to have, in Effect, a new Trial at Law, of a *mere legal* * Queſtion; becauſe the Verdict, in Juſtice, under all the Circumſtances, *ought not to conclude:* And many Bills have been retained upon this Ground; and the Queſtion tried over again at Law, under the Directions of a Court of Equity. And therefore of *late* Years, the Courts of Law have gone more *liberally* into the granting of New Trials, according to the Circumſtances of the reſpective Caſes. And the Rule laid down by Lord *Parker*, in the Caſe of the *Queen* againſt *the Corporation of Helſton*, *H.* 12 *Ann. B. R.* † ſeems to be the *beſt General Rule* that can be laid down upon this Subject; *viz.* " Doing *Juſtice* to the " Party," or in other Words " Attaining the *Juſtice* of the " Caſe."

* P. 395.

† See *Lucas's* Reports, p. 202.

The Reasons for granting a New Trial muſt be collected from the *whole* Evidence, and from the *Nature* of the Caſe conſidered under *all its Circumſtances.*

This Power may be exerciſed at much leſs Expence of Time and Money, therefore *more beneficially for the Subject*, by the Court of *Common Law* where the Cauſe has been tried.

Of late Years, New Trials have been granted not only after Trials at *Niſi prius*, but alſo after Trials *at Bar*. And it is at leaſt *equally reaſonable* to do it after Trials at Bar, as after Trials at *Niſi prius*, (if the Juſtice of the Caſe demands it;) or, indeed, rather *more* ſo, as the latter muſt be done upon what could have actually and perſonally appeared to a *ſingle* Judge only, whereas the former is grounded upon what muſt have manifeſtly and fully appeared to the *whole* Court.

I come now to the preſent Verdict; and ſhould be ſorry that the Queſtion depended upon *my* being ſatisfied, or diſſatisfied: and therefore I have ſtated the whole.

If the Matter in Diſpute was of *great Value*, I will not ſay that all the ſuſpicious Circumſtances *might not* be a Ground for a new Trial; to give the Plaintiff an Opportunity of getting the Inſtrument *inſpected* by Perſons acquainted with her *Hand*: though I think upon the Evidence *laid before the Jury*, the Verdict, in *that* reſpect, was *right.*

What

What I go upon is the apparent manifeſt FRAUD *and* IMPOSITION in *obtaining* the Diſcharge from the Teſtatrix, if She *really* ſigned it.

FRAUD or COVIN may, in Judgment of the Law, *avoid* every Kind of Act: Many Inſtances are put in *Fermor*'s Caſe. 3 *Co.* 77.

*P. 396. * "*What* Circumſtances and Facts *amount* to ſuch Fraud "or Covin," is always a Queſtion of *Law*. Courts of Equity, and Courts of Law, have a *concurrent* Juriſdiction, to ſuppreſs and relieve againſt FRAUD. But the Interpoſition of the former is often neceſſary for the *better inveſtigating* Truth, and to give *more complete* Redreſs.

The Writing, upon the *Face* of it, ſpeaks IMPOSITION. It purports being for *Conſideration*. She Releaſes the Principal, *in Conſideration of* 5*l. per Cent.* during her Life: Which is only legal Intereſt, and the preciſe Rate he was obliged to pay by his Note. The Defendant has ſet up *another* Conſideration, *not* expreſſed: which is not only *not proved* by him, but *diſproved* by the Evidence on both Sides.

He now contends, and his Counſel have argued, "that it "was intended to be revocable by Her during her Life; "and therefore was only in the Nature of a Legacy." That Power "to revoke" is *omitted*; the Writing, all of his *own hand*, and kept in his *own Cuſtody*: And if it was in the Nature of a Legacy, It is *revoked* by the ſubſequent Will.

The Teſtatrix *never imagined* She had ſtripped herſelf of this Money: In her *Circumſtances*, it would have been Madneſs. The Defendant, *during her Life*, did not dare to ſay, even to his own Wife, "that the Teſtatrix *had given* him this "Money."

He did not dare to claim it, *immediately*, after her Death: but would have *compounded*, by withdrawing his Caveat, to have got his Note delivered up. *No Anſwer* was attempted, by Proof, to the *apparent Impoſition*. Upon his own Caſe ſtated by himſelf, and the Evidence on both Sides, the Tranſaction to get her hand to this Writing muſt have been *fraudulent*: And if it be ſo, the Law ſays "He ſhall *not avail* himſelf "of it."

The *Attention* of the Jury was artfully drawn to the heinous Charge of Forgery, *only*. And I left the Queſtion of FRAUD to them, without any *expreſs* Direction "that the Circum-"ſtances ſpoke Fraud apparent." The *ſame* Jury might, upon Reconſideration, find a *different* Verdict. I dare ſay, they *meant* to do right.

But the Merits of the Caſe appearing to Me in this Light, I am clearly of Opinion that there *ought* to be a NEW TRIAL.

Theſe are my Sentiments: My Brothers will judge Whether I am right or not.

* Mr. Juſtice DENISON concurred in them. * P. 397.

He added, That it would be difficult perhaps to fix an *abſolutely General Rule* about granting new Trials; without making ſo many Exceptions to it, as might rather tend to darken the Matter, than to explain it: But the granting a new Trial, or refuſing it, muſt depend upon the LEGAL DISCRETION of the Court guided by the *Nature and Circumſtances* of the particular Caſe, and directed with a View to the *Attainment of Juſtice*.

In the preſent Caſe, He ſaid, It appeared to Him, "That "the Teſtatrix, Mrs. *Criſp* had been *impoſed upon*:" And He held "That FRAUD was ſufficient to *invalidate* this her "Defeazance (the ſubſequent Note of Diſcharge ſigned by "Her,) even in a *Court of* COMMON *Law*." For Proof of which, He cited *Throughgood's* Caſe, 2 *Co.* 9. Where it was holden "That the Deed of an unlettered Layman, into the "Execution whereof he is *deceived*, by its being wrong "read to him, or falſely explained to him, (though by a "Stranger to the Party to whom the Deed is made,) ſhall "*not bind* the unlettered Perſon who made it."

Mr. Juſt. FOSTER agreed to the Propriety of what had been ſaid; as to ſuch Caſes in which the Juries give Verdicts *againſt* Evidence; and even as to Caſes where there may be a Contrariety of Evidence, but the Evidence, upon the Whole, in Point of Probability, greatly *preponderates againſt* the Verdict; (Which depending on a Variety of Circumſtances, is Matter of Legal Diſcretion, and cannot be brought under any General Rule:) But in all Caſes where the Evidence is *nearly in Equilibrio*, He declared that He ſhould always think himſelf bound to have Regard to the *Finding of the Jury*; For "ad quæſtionem * *Facti* reſpon- "dent *Juratores*." In *ſuch* a Caſe, it is *not* the Province "of the *Judge*, to determine: It ought to be left to the *Jury*.

* See Trials per pais, pa. 447. (the laſt Paragraph of the Book) extremely ſtrong, on this Subject, in favour of Juries.

FRAUD will *invalidate*, in a Court of *Law*, as well as in a Court of *Equity*. We all remember the Caſe of *Wyndham* v. *Chetwynd*, *P.* 1755. 28 *G.* 2. in this Court: Where the Court directed the Jury to find "*Non deviſavit*," though there was a *Deviſe in Fact*; but it was *obtained by Fraud*, and therefore conſidered as *no Deviſe* at all.

And He agreed with Lord *Mansfield* and Mr. Juſtice *Deniſon*, That in the preſent Caſe, the Defeazance or Diſcharge (the ſubſequent Note) was obtained from Mrs. *Criſp by Fraud*; And that it *appeared*, upon the whole of the Evidence "that it was *ſo obtained*:" And that the Jury have drawn a WRONG CONCLUSION from Facts *addmitted on both Sides*.

* P. 398. * Therefore He thought The Verdict ought to be *ſet aſide*.

Per Cur. * unanimouſly,
The RULE for *ſetting aſide* the Verdict was made *abſolute*.

* Note. Mr. Juſtice *Wilmot* was abſent (in Chancery.)

Mr. *Gould*, of Counſel for the Plaintiff, moved that it might be *without Coſts*: But He was anſwered by Mr. Juſtice *Deniſon* and Mr. Juſtice *Foſter* (Lord *Mansfield* being now gone,) That this was directly contrary to the Terms upon which He himſelf had moved it. And accordingly They only Ordered the Verdict to be ſet aſide

Upon Payment of Coſts by the Plaintiff.

Memorandum—The Cauſe never came on, to be tried again. Probably, the Defendant acquieſced in the Opinion of the Court, and paid the Money.

A Black Merchant of Bombay *verſus* Dorrell.

MR. *Dorrell*, who came from *Bombay*, and had a Diſpute with a Black Merchant there, of a Civil Nature (concerning Property,) had upon his Leaving *Bombay*, entered into a Bond conditioned for his *Appearance in this Court* at his Arrival in *England*, TO ANSWER *to any Demand*, that might be made againſt him by or on Behalf of the ſaid *Black Merchant* in that Country; and alſo to abide by the Determination of the Mayor's Court there, or elſe to appeal therefrom to the King in Council.

Serj. *Hewitt* moved, on Behalf of Mr. *Dorrell*, that He *might appear in this Court, in ſuch* METHOD *as the Court ſhould judge proper*, in Order to *prevent the Forfeiture* of his Bond.

The COURT, after requiring Notice to be given to the *Eaſt-India* Company (who did not oppoſe it,) admitted his Appearance; and directed that He ſhould enter into a Recognizance (with Sureties) in the Penalty of the Bond, to

to anſwer the Demands expreſſed in the Condition of the ſaid Bond: Which He was to do before One of the Judges of this Court; as his Sureties were not now preſent.

Note—This Rule was taken on the *Civil* Side (of the Court.)

* Rex *verſus* Middlehurſt. * P. 399.

MR. *Norton* ſhewed Cauſe againſt quaſhing an Order of two Juſtices, and an Order of Seſſions confirming it, made in Purſuance of the Act of 11 *G.* 2. *c.* 19. § 3. (for the more effectual ſecuring the Payment of Rents, and preventing Frauds by Tenants,) againſt one *Thomas Middlehurſt*, for wilfully and knowingly aiding and aſſiſting in fraudulently removing and conveying away 5 Cows, *&c*, OR in concealing the ſame,

Mr. *Gould*, who had moved to quaſh this Order, founded his Motion upon two Objections; *viz.*

1ſt Objection. The whole Adjudication refers to the Complaint of One *Thomas Weſton*; wherein there is *no Charge upon Cheſterton*, the *Tenant*, at all; nor upon the Defendant *Middlehurſt*, for aiding and aſſiſting *Him:* Neither is it ſtated "That *Cheſterton*, the Tenant DID *remove* the Goods."

2d Objection. The Act creates two Offences, *viz.* aſſiſting in *removing*, and aſſiſting in *concealing* the Goods. Now it is not ſpecifically charged upon the Defendant *Middlehurſt*, that he willingly and knowingly did *either One* of theſe two Things: It is only alledged that he wilfully and knowingly did One OR the Other. In 1 *Salk.* 371. *Rex* v. *Stocker*, An Indictment for forging *or* cauſing to be forged, was holden ill; becauſe the Charge was in the *disjunctive*. 2. *Hawk. P. C.* 225. § 60. An Indictment charging a Man *disjunctively*, is VOID: For the Offences are diſtinct; And it appears not, of *which* of them the Defendant is accuſed. So here, it does not appear, WHICH of the *two* Offences the Juſtices have convicted him of.

And 2 *Ld. Raym.* 1265. *Queen* v. *Bains*, proves that the Court will make no Intendment againſt the Defendant.

Upon which Objections, he obtained a RULE to SHEW CAUSE "why the Orders ſhould not be quaſhed."

And now Mr. *Norton* ſhewed the following Cauſe againſt quaſhing them.

* P. 400. 1ſt. * As to the 1ſt Objection—" That it is not deſcribed " ſufficiently, *What* the *Offence* is." He anſwered That this is an *Order*: And the Court will *not intend* it to be ill. To prove which, He cited *Rex* v. *Biſſex*, *Tr.* 29 *G.* 2. *B. R.*

2dly. As to the 2d—The Charge being in the *Diſjunctive*, " That he wilfully and knowingly aided and aſſiſted the Te- " nant in removing the Goods, OR in concealing the ſame." He ſaid, The Crime and the Puniſhment are the *ſame* upon *both*: And the Defendant *was heard*.

Mr. *Gould* for the Defendant, replied.

1ſt, It is not at all ſtated " That the *Tenant* DID *remove* " the Goods."

2dly, The Aiding and Aſſiſting *in removing*, is a *different* Offence from aiding and aſſiſting *in concealing*: And here it is only charged in the ALTERNATIVE.

LORD MANSFIELD—Upon INDICTMENTS, it has been ſo determined, " That an *Alternative* Charge is *not* good;" As " forged *or* cauſed to be forged: Though *One only* need be *proved*, if laid *conjunctively*, (as " forged *and* cauſed to be " forged.") But I don't ſee the Reaſon of it: The Subſtance is exactly the ſame; the Defendant muſt come prepared againſt both: And it makes no Difference to him, in any reſpect.

But this is an ORDER: And being *good in Subſtance*, needs not be literally *ſo ſtrict*.

Mr. Juſt. DENISON thought alſo, that the Caſes upon *Indictments* are very nice. But this is *not* an Indictment, but an ORDER: And therefore being good in *Subſtance*, needs not be ſo ſtrict in *Form*, as an Indictment muſt be. And either Aiding or Aſſiſting *in removing*, OR aiding or aſſiſting *in concealing*, is equally an Offence: And theſe are the very Words of the Act. 'Tis *only Form*; and does not at all vary the Defence or Puniſhment. I am not therefore inclined to the ſame Strictneſs as was obſerved in the Caſe of *The King* v *Stocker* in 1 *Salk.* 371.

* Mr. Juſt. *Foſter* was out of Court and Ld. Commiſſioner *Wilmot* in Chancery.

Per Cur. * RULE DISCHARGED.
And conſequently BOTH ORDERS AFFIRMED.

The End of *Trinity* Term 1757, 30 & 31 *Geo.* 2.

* Michaelmas Term

* P. 401.

31 Geo. 2. B. R. 1757.

Maſters *verſus* Manby.

MR. *Norton* moved that the Defendant might be diſcharged upon Common-Bail, as being a *menial Servant to a Public Miniſter*, (*viz.* Meſſenger to Baron *Haſlang*) on 7 *Ann. c.* 12. Mondey, 7th Nov. 1757.

But the Defendant was not able to make out a Caſe ſufficient to induce the Court even to grant him a Rule to ſhew Cauſe. He not only had been formerly a Trader, and a Bankrupt; (upon which indeed no Streſs was laid, as it appeared that he had not traded at all, ſince he had obtained his Certificate under the Commiſſion;) but was confeſſedly a *Land-Waiter* at the Cuſtom-Houſe in *London*, and *officiated there* as ſuch: though He ſwore to the Hiring, and alſo to the having *ſometimes* executed this Service to the Baron, as *his Meſſenger*.

Yet, upon the whole, Lord MANSFIELD was clear that this Man could never be eſteemed a § *bona fide* Domeſtic of a foreign Miniſter: And the other Judges concurring, the Motion was DENIED. § V. poſt. p. 1478. and p. S. P.

Bennet, qui tam, &c. *verſus* Smith.

THE COURT refuſed *to ſet aſide* a *Non Proſ. regularly* obtained by the Defendant, againſt the Plaintiff who was only a COMMON *Informer*, (who ſued for a Penalty of 10000l. upon the Statute of Uſury;) though the Plaintiff offered to pay the Coſts of ſetting it aſide. onday. 14th Nov. 1757.

For, though Lord MANSFIELD ſeemed to think that the Caſe might perhaps have borne a different Conſideration, in

*P. 402. *in caſe the Plaintiff had been the *Party* REALLY INJURED, and had ſued in Order to come at *Juſtice and Reparation* for ſuch real Inquiry; Yet not only his Lordſhip Himſelf, but

†Mr. Juſt. Foſter was not in Court. The whole COURT (now † preſent) were clear and unanimous that where a MERE *common Informer*, who ſued for PUNISHMENT *only*, had been guilty of a Slip or Miſtake which put him *out of Court* and intitled the Defendant to enter a *Non-Proſ.* againſt him, they would not exerciſe their *diſcretionary Power*, in ſetting aſide this *Non Proſ.* thus regularly obtained, and reſtoring the *mere Common Informer* to an Opportunity of proceeding for the Sake of *Puniſhment* only.

And they diſtinguiſhed the preſent Caſe from Caſes of AMENDMENT: Which indeed the Court would not ſcruple to make, even in Caſes of *Qui tam* Actions, where there was any Thing to *amend by*; and which they had frequently done, in ſome Inſtances that were mentioned, or at leaſt hinted at; as, in particular, the giving Leave to *change the County*, in a *Qui tam* Action, on Mr. *Norton*'s Motion, not many Terms ago.

Tueſday, 15th Nov. 1757.

Rex *verſus* Robert Chappel.

A Motion was made by Mr. *Burland*, and ſupported by Mr. *Norton*, for an Information for *ſending a Challenge*, by Letter, to Mr. *Hamilton* of *Wells*: But they only produced *Copies*, NOT *the* ORIGINALS of the Letters wherein the Challenge was contained.

THE COURT made a Rule to ſhew Cauſe, upon reading the COPIES *only* of the Letters (ſuch Copies being ſufficiently verified.)

Rex *verſus* Williams.

Wedneſday. 16th Nov.

THIS was a Cauſe in the Crown-paper, upon a Writ of Error directed to the Juſtices of the Great Seſſion in the County of *Denbigh*, upon a Judgment given there for the King againſt the Defendant after a Verdict, upon an Information brought againſt Him in that Court by the Prothonotary and Clerk of the Crown there, *at the Relation of John Moſtyn*, Eſq; *according to the Form of the* STATUTE in that Caſe made and provided.

The Information ſets forth the Incorporation of the Town of *Denbigh*, by Letters Patent dated 14th *May* 15 *C.* 2. Which gave them Power to have and hold *within the Burrough a Court of Record* on every *Friday* in every ſecond Week

* Week throughout the Year, to be held *before the Bailiffs* of the ſaid Burrough for the Time being, or one of them.

Then it alledges the Acceptance of theſe Letters Patent by the Corporation.

It further ſhews, that by Virtue of theſe Letters Patent, the ſaid Court of Record, from the Time of making the ſaid Letters Patent, to the Time of exhibiting the Information, ought to have been held within the ſaid Burrough on every *Friday* in every ſecond Week through the Year, *before the Bailiffs* of the ſaid Burrough for the Time being, or one of them.

Then it charges that *Friday* the 13th Day of *December* 25 *G.* 2. was a Day on which the ſaid Court of Record ought to have been ſo held within the ſaid Burrough, by Virtue of the ſaid Letters Patent. That the Defendant (well knowing the Premiſſes aforeſaid) *on the ſaid 13th Day* of *December* 25 *G.* 2. at the Burrough of *Denbigh* aforeſaid in the County of *Denbigh* aforeſaid, *in the Abſence* of *John Hoſier* Gentleman and *David Williams* Gentleman, who then and long before and afterwards were *the Bailiffs* of the ſaid Burrough, and of each of them, did wrongfully and unjuſtly PRESUME TO HOLD *and* DID *hold* THAT *Court of Record within the ſaid Burrough*, WITHOUT *any* legal Warrant Right or Authority whatſoever; and did then and there *preſide* therein; He the ſaid *Thomas Williams*, (the Defendant) then NOT *being one of the Bailiffs* of the ſaid Burrough.

PLEA—That He *did* NOT *hold* the ſaid Court of Record in the ſaid Information ſuppoſed to have been held by the ſaid *Thomas* (the Defendant) *nor did preſide therein*, in Manner and Form as by the Information is charged againſt him. (Upon which, Iſſue is joined.)

And the Defendant further ſaith, that at the Time mentioned in the Information, HE HAD NOT, NOR HATH *any Warrant* Right Power or Authority; but *wholly* DISCLAIMS to have any Warrant Right Power or Authority whatſoever to hold the ſaid Court of Record, or to preſide therein: And this He is ready to verify. Wherefore he prays Judgment, and that He of the Premiſſes aforeſaid may be diſcharged and diſmiſſed by the Court, and ſo forth.

Upon the Iſſue joined, the Jurors find that the Defendant, on 13th *December* 25 *G.* 2. at the ſaid Burrough of *Denbigh*, in the Abſence of *John Hoſier* Gentleman, and *David Williams* Gent. who then and long before and afterwards were the Bailiffs of the ſaid Burrough, and of each of them, *did* wrongfully and unjuſtly preſume to hold, and *did hold* the ſaid Court of Record in the ſaid Information mentioned,

*P. 404. * mentioned, within the ſaid Burrough, *without* any legal Warrant or Right or Authority whatſoever; and *did* then and there *preſide* therein; (He the ſaid *Thomas Williams* then not being one of the Bailiffs of the ſaid Burrough;) as in the ſaid Information is alledged.

The Judgment of the Court is "that the Defendant do "*not in any Manner intermeddle with or concern Himſelf* in "and about holding of the ſaid Court of Record within "the ſaid Burrough, in the ſaid Information ſpecified; but "that He be abſolutely *forejudged and excluded from holding* "the ſaid Court for the future; and that, in order to ſa-"tisfy our Sovereign Lord the King, for and on Account "of the Uſurpation aforeſaid, He be *taken*, and ſo forth: "AND that the ſaid *John Moſtyn, the Relator* above-men-"tioned in this Behalf, *do recover* againſt the ſaid *Thomas* "*Williams*, the Sum of 141l. 12s. 11d. *for his* COSTS by "him laid out and expended in carrying on his Suit in this "Behalf, ACCORDING *to the Form of the* STATUTE *in ſuch* "*Caſe made and provided.*"

The Aſſignment of Error is——

1ſt. General—*viz.* That Judgment is given for the King againſt the Defendant: Whereas by the Law of this Kingdom, it ought to have been given for the Defendant.

2dly, Special—*viz.* And alſo in this, that it appears by the ſaid Record, that Judgment in the Plea aforeſaid was given "that the ſaid *John Moſtyn*, in the ſaid Plea named "*the Relator therein, recover againſt the ſaid Thomas Wil-liams* 141l. 12s. 11d. *for his* COSTS laid out in that Suit." Whereas by the Law of this Realm, No *Judgment ought to have been given, in the Plea aforeſaid, for* THOSE *or for any other* COSTS in that Suit. And therefore in *that* reſpect alſo, there is manifeſt Error.

To this Aſſignment of Errors there is a Joinder in Error, in the Name of the King's Coroner and Attorney in this Court.

Mr. *Madocks*, for the Plaintiff in Error——

Objected, that this was NOT *a Caſe within* 9 *Ann. c.* 20: And that therefore there could not, nor ought to be any Judgment for Coſts.

That Act takes in only two Caſes: 1ſt. Where an Office is *uſurped*: and 2dly. Where he *has had* a Title, but unlawfully *holds* and exerciſes the Office: But the whole is *confined to* OFFICES *in Corporations*; and the Words "ſaid Offices "and

"* and Franchiſes" are tied up to OFFICES *in Corporations*, * P. 405. or to the Franchiſe of being a *Freemen*. [See Sections 4 & 5.]

Whereas this Information is only for *holding a Court* in the Burrough, in the Abſence of the two Bailiffs; He not being one of the Bailiffs of the Borough. So that this is *no direct Charge* of uſurping the OFFICE *of Bailiff*. And an *indirect* Charge is not ſufficient: 2 *Hawk. P. C.* 261. "Whatſoever Certainty is requiſite in an Indictment, the "ſame, at leaſt, is neceſſary alſo in an Information." 1 *Salk.* 375. *Rex* v. *Knight*; and 1 *Ld. Raym.* 527. *Rex* v. *Knight and Burton*, S. C; prove expreſsly "That *argumentative* Informations are naught."

This is only a Charge of doing *a ſingle* Act; which Act belonged indeed to the Office of Bailiff: But it is no Charge of his *claiming the* OFFICE *of Bailiff*; Nor could the Right to the OFFICE *of Bailiff* be tried *upon* THIS *Information*. And this, He ſaid, was a new Caſe: For the Common Way is to charge the Defendant *directly* with uſurping an Office; whereas this only charges him with Facts that may indeed be *Evidence* of ſuch Uſurpation of the Office of Bailiff; but does not charge Him with a direct Uſurpation.

Secondly, It cannot properly be called an Information *in Nature of a Quo Warranto* at *Common* Law: For it does not charge Him with exerciſing the Office at the TIME *of exhibiting the Information*.

"*Non uſurpavit*," generally and alone, is not a ſufficient Plea to an Information in Nature of *Q. W.* at Common Law. *Godbolt* 91. Sir *Jervis Clifton*'s Caſe; and 3 *Leon.* 184. Sir *Gervaſe Clifton*'s Caſe; S. C. ‡

[‡ This Caſe was not determined; V. Godbolt 93.]

This Information only charges Him with holding the Court upon a particular Day. On the whole, therefore, this Information is not good at *Common Law*; no more is it upon the Act of Parliament.

Mr. *Hall contra, pro Rege.*

This STATUTE-*Judgment*, "for the *Coſts*," is good: And ſo alſo is the *Common-Law* Judgment, "of *Ouſter* of "the Franchiſe."

1ſt. The Act of 9 *Ann. c.* 20. ought to be *liberally* conſtrued.

This Information is an Information for uſurping the *Office of one of the Bailiffs* of the Burrough of *Denbigh*. The Facts charged upon the Defendant *amount* to an Uſurpation of the *Office*; though the Word, "*uſurp*" is not indeed made Uſe of. And it is not neceſſary to uſe this or any

* P. 406. * any other *technical* Term. Therefore this Uſupation of the *Office of Bailiff*, is here ſufficiently alledged.

But, at leaſt, it is a Charge of an Uſurpation of or intruding into a *Burrough-Franchiſe*: Which is a Caſe within the Act. The Preamble and Body of the Act prove this.

This is for holding and preſiding at a Court *in* a Corporation: Which certainly is a *Corporation-Franchiſe*. And the Defendant, by his Manner of Pleading, has conſidered this as an Information on the Act, for a Burrough-Franchiſe: For He firſt pleads to the particular Change, and then diſclams.

But, at leaſt, this Caſe ſhall be taken to be within the *Equity* of the Statute: Which was made for the Benefit of the Commonwealth. Which Point He endeavoured to prove, from ſeveral Inſtances of *extenſive Conſtructions* of Statutes; And particularly of Statutes giving Coſts. For the latter, He cited *Cro. Eliz.* 257. *pl.* 36. ‡ *Haſelip* v. *Chaplen*. And He ſaid, that the Court often Ordered Coſts, even where the Statutes had not given them.

‡ [Adjournatur.]

As to the Caſe of *Rex* v. *Knight*, The Facts there charged were not ſufficient to ſupport the Concluſion: It was an imperfect defective Information. But here, it is poſitively alledged "That he held this Court without any legal "Warrant Right or Authority whatſoever."

And this may be made good by Intendment. *Raym.* 34, 35. *The King* v. *Read*. *Siderf.* 91. *Rex* v. *Cover*. *Cro. Jac.* 473.

Secondly—As to the not charging the Defendant with exerciſing the Office *at the Time* of the Information; *One ſingle Act* is ſufficient.

Upon the Whole, this Caſe is either within the *Words*, or at leaſt within the *Intent* of the Act.

Mr. *Madocks* in Reply—There is no *expreſs*, but only a *circumſtantial* Charge, of exerciſing the *Office* of Bailiff.

The *Equity* of every Statute ſtand upon the Foundation of the Statute itſelf. Now this Act is certainly confined to *Offices* in Corporations, affecting the Rights of Election of Members to Parliament; And was not intended to take in Rights of holding *Courts* or *Fairs* in Corporations; though the Words of the *Title* are indeed general, "the Rights of "Offices and Franchiſes in Corporations and Burroughs." But the *Body* of the Act confines the Word "Franchiſes"

to

* to the Rights of being free: And the Body of the Act is the Part to be regarded. * P. 407.

And here is no Charge of intruding into the *whole* Office: Which is an *entire* Thing. The Uſurpation of *Part* cannot be an Uſurpation of the *Whole* of an Office.

Secondly—The Information ought to be good in its ſelf and upon its own Strength, independent of the Plea. This is an Information only for doing this *ſingle* Act, *ſix Years ago*.

LORD MANSFIELD—

1ſt. The Act is meant to extend to *all Officers* or *Corporation*, as ſuch; and as far as relates to all the Corporate Rights of the Burgeſſes and Freemen, it is very legally, clearly, and correctly drawn: But it is not within the Reaſon or Meaning of the Act, that it ſhould extend generally to ALL Offices or Franchiſes exerciſed WITHOUT *Authority from the Crown*, within a Corporation. It was meant to be *confined* to ſuch Franchiſes as were claimed in Inſtances affecting thoſe Rights between Party and Party.

The *Title* cannot control the *Body* of the Act.

And the *Equity* of an Act can be carried no further than to what was within the *View and Intention* of the Legiſlature, and the *Miſchief* meant to be prevented. Whereas here is *no ſuch* Equity, to bring the preſent Caſe within the Act.

Here is no Charge of uſurping or exerciſing or claiming the *Office* of *Bailiff*. I do not ſay that any particular *technical* Words are neceſſary. But here are none that are at all tantamount: It is not even ſaid that he held the Court, "*as* Bailiff." There is no Argument neither, or Inference, "that He did ſo:" Rather indeed, the contrary; for it ſeems implied in the very Charge, that if they had been there, he could *not* have held.

No Fruit is obtained of this Trial, but as of an Uſurpation *upon the Crown* and for an *Offence* or Miſdemeanour; Here is nothing relating to the Intereſt of any PRIVATE *Perſons*. And the Manner of Pleading proves nothing: For he was obliged to plead ſo, in *either* Caſe.

Therefore, as a *Statute*-Judgment it is wrong.

2dly. But as to the COMMON-*Law* Part of the Judgment —Mr. *Maddocks*'s Objection will not hold. For he may certainly

* P. 408. * tainly be puniſhed for *One ſingle* Offence; though he goes no further. So that *this Part* of the Judgment is right.

Mr. Juſtice DENISON concurred, That the *Statute*-part of the Judgment, as to the *Coſts*, is wrong: But the *Common*-Law Part, *viz.* the Judgment of "*Excluſion* from the fu-"ture Exerciſe of the Franchiſe," is right.

As to the former—The Charge is not within the Act of Parliament of 9 *Ann. c.* 20.

The Information ſets out the Charter; which gives Power to the Bailiffs to hold this Court in the Corporation: And it calls upon the Defendant to know by what Authority he held it in the Abſence of the Bailiffs. But ſurely, this has no Relation in the Earth to the *Office of* BAILIFF; nor will it be ſaid that he could, upon *this* Information, have been OUSTED *of the Office of* BAILIFF. It was not, in the preſent Information, neceſſary to ſet out as Part of the Charge upon the Defendant "That the Court ought pro-"perly and regularly to have been holden *before the Bailiffs*:" It had been enough, to have aſked the Defendant "By "what Authority *He claimed* to hold *this Court of Record*;" (without mentioning the Preſence or Abſence of the Bailiffs, at all.)

There are Numbers of Offices which a Man may uſurp, and be liable to an Information for uſurping; which are NOT *Franchiſes in Corporations*. But *Theſe* "Franchiſes" mentioned in the Act, mean *corporate* Rights, or *Rights* to *Freedom* in Corporations. The Words of the Act are plain, that this is *not* a Caſe upon which the Informer can recover *Coſts*.

The Proceeding indeed may be, at *Common* Law, for *Puniſhment*. Therefore this *latter* Part is right. But the Judgment *as to* COSTS ought to be reverſed.

And the *Mention of a* RELATOR is no more than *Surpluſage*, and may be rejected; and therefore *will not hurt* the Common-Law Judgment.

Mr Juſt. FOSTER was clear too—

1. That this Caſe was not within the Act: Which never intended to give Coſts in Caſes of *this Kind*. The Word "Franchiſes" in the Act, means only Freedoms and Rights to be Members of the Corporation.

This

* This Act was drawn with great Care and Attention : (Judge *Powell* was the Perſon who drew it.) And there is no Reaſon to extend it beyond its Intention. * P. 409.

2dly. The Judgment at *Common Law* may be very right.

Mr. Juſt. WILMOT declared himſelf extremely clear in both Points.

Per Cur. unanimouſly——

The *Common-Law* Judgment, *viz.* as to the OUSTER, was affirmed: But the Judgment for COSTS (which was founded upon the *Statute)* was REVERSED.

Bond *verſus* Iſaac.

Monday, 21 November 1757.

THE *Exoneretur* which had been ordered to be entered (*V. ante* 339, 340.) was *not actually* entered on the Bail-piece, (by the Omiſſion of the proper Officer who ought to have entered it:) But the PLAINTIFF himſelf was *appriſed of the* Surrender; though his Attorney ſwore that *He* (the Attorney) had no Notice of it.

The Plaintiff's Attorney, not being appriſed of the Surrender of the Principal ſued out *Scire faciaſes* againſt the Bail; who paid the Money: But they were ſued out into *London* (where the original Cauſe of Action was;) and *not into* MIDDLESEX, where the Surrender was made, and where the Bail-piece remained.

The Bail had applied, upon both theſe Irregularities, (*viz.* 1ſt. the PLAINTIF's *being appriſed* of the Surrender and Order of the Court; and 2dly the *Scire faciaſes* not being ſued out into *Middleſex*;) that the *Scire faciaſes* might be ſet aſide for Irregularity, with Coſts; and the Money reſtored.

Mr. *Norton* was Counſel for the Bail, and had moved as above.

Sir *Richard Lloyd,* for the Plaintiff, now ſhewed Cauſe.

The COURT was clear, on *both* Points, that the *Scire faciaſes* were *irregularly* ſued out; and granted Mr. *Norton*'s Motion, by making the Rule abſolute, as prayed: Excepting only, that they omitted the *Coſts*: becauſe it would have been to no Purpoſe to have ordered them, as the Plaintiff himſelf (who was appriſed of the Surrender) was gone abroad; and the Attorney, (not being appriſed of it) had not acted with any ill Deſign or Intention to oppreſs.

Sheepſhanks

* P. 410. Tuesday, 22d November 1757.

* Sheepshanks et Uxor *verſ.* Lucas.

P. 29 *G.* 2. *Rot'lo* 622.

ERROR from *C. B.* to *reverſe a Common Recovery.* The Wife of *Sheepſhanks* claiming to be intitled (in Common with others) to a Remainder in Fee (under the Will of one *Broadbent)* after the Death of one *Thomas Pierſon*, Tenant in Tail, who was vouched in this Recovery; her Huſband and She bring this Writ of Error: And the Error aſſigned is, "The *Death of the* VOUCHEE, before Judgment;" concluding with an *Averment.*

"*In nullo eſt erratum*"—is pleaded: (Which *confeſſes* the Error aſſigned to be *true in Fact.*)

Serjeant *Poole* for the Plaintiff in Error—

Without Doubt a Perſon intitled to a Remainder after an Eſtate-Tail, *may have a Writ of Error* to reverſe a Common Recovery ſuffered by the Tenant in Tail, 3 *Co.* 3. *b.* The Marquis of *Wincheſter*'s Caſe is expreſs to this Purpoſe; and gives the Reaſon of it, at large. *Pigott, of Common Recoveries* 169. "If the Vouchee die before Judgment, it is "Error." 1 *Ro. Abr.* 742. Title *Error*; Letter A. *pl.* 3. 1 *Ro. Abr.* 747. Title *Error*; Letter K. *pl.* 1. 1 *Ro. Rep.* 301. *Holland et al.* v. *Lee. Bridgman's Rep.* 71. S. C. *Holland et al.* v. *Jackſon et al. Palmer* 224. *Darcy* v. *Jackſon*, S. C. *Dyer* 90. *a.* 4S, 188.

We claim under a Deviſe by the Will of one *Broadbent*, in Remainder after an Eſtate-Tail given to *Pierſon. Wynne* v. *Wynne, H.* 17 *G.* 2. *B. R.* is in Point to this Caſe—It was a Writ of Error by a Remainder-Man in Tail: And the very ſame Error was aſſigned, as is here. *There*, indeed, the *Fact* (of the Vouchee's dying before Judgment) was *denied:* And it was, upon Trial of the Iſſue, found "that She "was alive at the Beginning of the Term; but *died before* "*the Return* of the Summons *ad warrantizandum.*" And the Relation of Law, (which was in that Caſe inſiſted upon,) was not permitted to prevail. And the Entry of her Appearance *at* the ſaid Return (which was there entered on the Record) was holden *not* to be contrary to the Allegation of her Death *before* ſuch Return: *Becauſe* ſuch her Appearance was only entered *as* BY ATTORNEY: whoſe Authority ceaſed by her Death. So that the Error there aſſigned was *not* an Aſſignment contrary to the Record.

Mr.

* Mr. *Luke Robinſon contra*, for the Defendant in Error.* P. 411. Common Recoveries are *now* conſidered as Common Aſſurances; and are therefore to be favoured and ſupported. Even *another* Warrant of Attorney ſhall be preſumed: Though *One* already appears upon the Record. ‡ ‡ V. Pigott 168.

1ſt Objection. *No One* can *maintain a Writ of Error* upon a Judgment, but One who is either *Party* or *Privy*. But this Plaintiff in Error is neither *Party* or *Privy* to, nor *injured by the Judgment* here complained of. It does not appear that *Broadbent*, under whoſe Will ſhe claims the Reverſion, was ever *ſeiſed* IN FEE of the Eſtate: And therefore it does not appear how he had a *Right* TO DEVISE the Eſtate, in the Manner he has done. They *ought* to have *ſhewn* in their Writ of Error, "That he was ſeiſed *in* FEE:" Which the Defendant *might have traverſed*, if it had been ſo alledged.

2d Objection. No *Scire facias* or *Warning* has been given to the HEIR: Who may be an *Infant*, or may have many Things to plead. *Bernard Lucas* the Recoveror, is the only Defendant; Who is *only* NOMINAL, but has *no real* Intereſt.

3d Objection. It appears upon this Record, that *Bernard Lucas* has Judgment to recover againſt THOMAS COWPER: But *Thomas Pierſon* is no Party at all to the Writ. Therefore *Thomas Pierſon* (who only came in as Vouchee) had nothing to do with a Judgment againſt ANOTHER *Man*. Conſequently *Pierſon's* Death before Judgment is *no* ERROR: It can be only an *Irregularity*. And NO JUDGMENT is given at all, againſt *Thomas Pierſon*; The Recovery is againſt *Thomas Cowper*; who is indeed to have Recovery over in Value, againſt *Thomas Pierſon &c.* But this Recovery over in Value, againſt *Pierſon*, is *not* the Judgment *upon which* this Writ of Error is brought: *This* Writ of Error does *not tally with the Judgment* of which it complains.

4th Objection. This Error is *not well* ASSIGNED: For it is an Error *in* FACT; and therefore ought to conclude *to the* COUNTRY; which this *does not*. *Yelverton* 58. *Rex* v. *Goſper and Shire*. "When a Man aſſigns Error in Fact, he ought "to put himſelf *en paiis*," And the Plea of "*in nullo eſt* "*erratum*" *confeſſes nothing* but what is WELL *pleaded*. And that Caſe is Word for Word the *ſame* with this, as to the Concluſion of the Aſſignment of Errors: And there WAS "*Hoc paratus eſt verificare*," as well as here is.

Serj.

*P. 412. * Serj. *Poole*, in Reply—

1ſt. It is enough, if We ſuggeſt Matter *ſufficient to ſhew* that We are *privy to* and *affected by* the erroneous Judgment. It is ſufficient for us to ſhew the Deviſe of the Remainder to us; without any Neceſſity of ſhewing that the Deviſor was *ſeiſed in Fee*. And the Precedents are ſo—*Wynn* v. *Wynn* was ſo. Sir *John Dinely Goodyere*'s Caſe was ſo. *Darcy* v. *Jackſon*, *Palmer* 224. is ſo determined, "That *the Title* "*needs not* to be *ſet out*, as in a Proceeding *to recover Lands*." And all the Entries are ſo.

2dly. *Scire facias* is brought againſt the *proper Perſon*: Which is the *Recoveror*.

3dly. *Pierſon* appears by his Warrant and vouches: and there is Judgment over, in Value, *againſt him*.

4thly. There never was, nor properly can be ſuch a *Concluſion to the* COUNTRY. Here is a *new* Matter of Fact introduced: Which the other Party *perhaps will not controvert*. We cannot conclude to the Country, TILL the other Party *denies it*.

As to the Caſe in *Yelverton*—*If* it be as cited, yet, it can never be ſupported. The Aſſignment of an *Error in Fact* ALWAYS concludes with an *Averment*.

LORD MANSFIELD was clear for the Plaintiff in Error, on *all* the Points.

1ſt. The Writ of Error *needs not* to ſet forth a *complete* Title: It is only required of the Plaintiff in Error, to ſhew the *Connexion and Privity* between the Perſon againſt whom the Recovery is had, and the Perſon who brings the Writ of Error. This is *not* like a Proceeding to try the *Right* of the Land, or to recover the *Land itſelf*. The Precedents are ſo: And None are produced to the contrary.

2d. Objection. No Authority or Reaſon is produced, for a *Scire facias* to the *Heir*.

3d. Objection has no Weight in it: And the Caſe of *Wynn* v. *Wynn* is in Point againſt it.

4th. Objection. The Concluſion with an Averment, is right; and gives an Opportunity to try the Fact by the Country, if the Defendant in Error chooſes it: Which is all that is requiſite.

So

* So much as to the *Form*. And * P. 413.

As to the *Merits*—It is extremely clear that a Remainder-Man *ought* to have this Chance to the Benefit of the Entail; *viz.* To ſee that all the proper and requiſite Forms ſhould be gone through before He is barred of it.

It is plain that Judgment ought not to be given againſt any Man, *after* he is *dead*. And there could have been no Judgment againſt the Tenant to the Præcipe in a Common Recovery, without a Judgment likewiſe over, in Value, againſt the Vouchee: They are *all* entered at one and the ſame Time, and are Part of the *ſame Proceeding*.

Mr. Juſtice DENISON concurred—

1ſt. This GENERAL *Allegation* is ſufficient, ſurely, *in the* WRIT: He needs not ſhew a *complete Title*. Nay, even in a *Formedon*, I do not know that the Title needs to be completely and fully ſet out in the WRIT. And *Wynn* v. *Wynn* is an Authority, on this Head.

2dly. A *Scire facias* to the *Heir* was not neceſſary; nor any *Warning to* HIM: The *Recoveror* has the *legal* Right; and muſt be *taken* by the Court to have the real Intereſt.

3dly. The *Death of the Vouchee*, before Judgment, is Error in a Common Recovery; and *may be aſſigned for ſuch*. *Wynn* v. *Wynn* was in Point, to this.

4thly. The Caſe in *Yelv.* 58. is ſo far true, (and can mean no more than) that it ought to be put in a Method of being tried by a *Jury*. And here the Plaintiff in Error has done ſo: He ſays "He is READY *to verify it*." So that the Defendant in Error *might* have put it in Iſſue, if he had pleaſed. But he has choſen to plead "*in nullo eſt erratum*: Which *confeſſes the Fact*, and puts the Matter of Law upon the Judgment of the Court.

As to the *Merits*—The Remainder-Man has a Right, both in Law and Juſtice, to reverſe the Recovery, if it be erroneouſly ſuffered.

Mr. Juſt. FOSTER and Mr. Juſt. WILMOT declared their clear Concurrence in Opinion with LORD MANSFIELD and Mr. Juſt. DENISON.

Per Cur. clearly and unanimouſly
JUDGMENT REVERSED.

* P. 414. Windham Eſq. *verſus* Chetwynd Eſq.

Friday, 25th November, 1757.

Paſch. 28 *G.* 2. *Rot' lo* 53.

A Special Verdict upon a Will of Land, dated the 14th of *May* 1750; and a Codicil of the ſame Date, made by *Walter Chetwynd* late of *Grendon*, Eſq.

The Special Verdict—At which Day, before our Lord the King at *Weſtminſter* come as well the ſaid *William Wyndham Malachi Lindon Catherine Lindon Thomas Stevens* alias *Walter Paris* alias *Walter Chetwynd Suſannah Blacknel Henry Perrot George Huddleſton* and *James Crofts* by their Attorney, as the ſaid *William Henry Chetwynd* by his Attorney. And the Jurors *&c*, being ſummoned *&c*, do come, *&c*, and being elected *&c*, do find, As to the firſt Iſſue joined between the ſaid Parties, that the ſaid *Walter Chetwynd* was, at the Time of making the ſaid Writings importing to be his laſt Will and Codicil of ſound Mind. As to the third Iſſue, they find that the Teſtator did not, by the ſaid Writing importing to be his laſt Will, Deviſe to the aforeſaid *William Wyndham* and his Heirs any Lands or Tenements in the County of *Warwick*, In Truſt or for the Benefit of the ſaid *Thomas Stevens* alias *Walter Paris* alias *Walter Chetwynd*. And as to the Fourth Iſſue, the Jury find that the Teſtator did not, by the ſaid Writing importing to be his laſt Will, Deviſe to the ſaid *Catherine*, now *Catherine Lindon* the Wife of the ſaid *Malachi Lindon*, an Annuity of 200l. by the Year, for the Term of her natural Life. And as to the ſecond Iſſue, the Jury find that the Teſtator was in his Life Time ſeiſed in Fee of certain Lands Tenements *&c*, in the ſeveral Counties of *Warwick* and *Stafford*, of the yearly Value of 300l. and being ſo thereof ſeiſed, he the ſaid *Walter Chetwynd*, in his Life Time, ſigned ſealed and publiſhed a certain Paper Writing bearing Date the 14th Day of *May* 1750, purporting to be his laſt Will and Teſtament, and likewiſe another Paper Writing purporting to be a Codicil indorſed on the ſaid firſt-mentioned Paper Writing, and of the ſame Date; (which Will and Codicil it ſets out *in hæc verba*;) And in the former, there is a *Charge* upon the Reſidue of his *Real* and perſonal Eſtates, for the Payment of all his juſt *Debts*, Legacies, and Incumbrances: And that the ſaid Paper Writings were ſo ſigned *&c*, by the ſaid *Walter Chetwynd* in the Preſence of *Stafford Squire*, *Robert Baxter*, and *Joſiah Higden*; who likewiſe atteſted the ſame at his Requeſt, in his Preſence, and in the Preſence of each other. And they further find that the ſaid *Stafford Squire* and *Robert Baxter*, being Attornies at Law, were in or about the Year 1747, employed by the ſaid *William Chetwynd* to ſolicit

ſolicit a private Act of Parliament " for Sale of the Eſ- * P. 415.
" tates late of *Henry Fleetwood* Eſq; deceaſed, in the Coun-
" ty of *Lancaſter*, for raiſing Money to diſcharge Incum-
" brances affecting the ſame *&c.*" And that the ſaid *Stafford Squire* and *Robert Baxter* charged the ſaid *Walter Chetwynd Debtor in their Books*, for the Fees and Expences of paſſing the ſaid Act: And which Charge *continued ſo, until and after the Death* of the ſaid *Walter Chetwynd*. And that at the ſame Time of the ſaid ſigning ſealing and publiſhing of the ſaid ſeveral Paper Writings, and alſo at the Time of the Death of the ſaid *Walter Chetwynd*, there was *due and owing to the ſaid S. S. and R. B.* for the ſaid Buſineſs done, the Sum of 318l. and that ſome Time after the Death of the ſaid *Walter Chetwynd*, the ſaid *S. S. and R. B. delivered a Bill* for paſſing the ſaid Act *to the Truſtees* nominated and appointed in and by the ſaid Act of Parliament for the Purpoſes therein mentioned: and afterwards, and before the Examination of the ſaid *S. S.* and *R. B.* in this Cauſe the ſaid *S. S.* and *R. B.* received *from the ſaid Truſtees*, at ſeveral different Times, ſeveral Sums, amounting in the whole to 302l. 4s. 8d. three farthings, and that the ſaid *Truſtees were willing to have paid the Remainder*, if it had not been for a Miſcalculation. And the Jury further find that in the ſaid private Act of Parliament there is contained a certain *Clauſe for Payment of the Expences* attending the ſaid Bills: (which Clauſe they find *in hæc verba.*) They further find that at the Time of the ſigning ſealing publiſhing and atteſting the ſaid Paper Writings, there was a *current Account* open and ſubſiſting between the ſaid *S. S.* and *R. B.* and the ſaid *Walter Chetwynd* for *other* Buſineſs excluſive of the Expences of paſſing the ſaid private Act: on the Balance of which Account, if ſtated at that Time, the ſaid *S. S.* and *R. B.* were indebted to the ſaid *Walter Chetwynd* in the Sum of 138l. 14s. 10d. They further find that at the ſaid Time of the atteſting of the ſaid Writings, and alſo at the Time of the Death of the ſaid *Walter Chetwynd*, there was due and owing from him to the ſaid *Joſiah Higden*, his *Apothecary*, the Sum of 18l. 5s. 5d. on ſimple Contract: Eleven Pounds whereof were ſo due on 25th *December* 1749, and *before the laſt Sickneſs* of the ſaid *Walter Chetwynd*. They alſo find that the ſaid *Walter Chetwynd* died on the 17th of *May* 1750, without Iſſue, and ſeiſed *&c:* and that the ſaid *William Henry Chetwynd* is the only Brother and Heir at Law of the ſaid *Walter Chetwynd*. They further find that his real Eſtate at the Time of ſigning *&c.* and alſo at the Time of his Death, was ſubject to certain Mortgages made thereof, by the ſaid *Walter Chetwynd* to the Amount of 19000l. And of 5000l. more, made by the ſaid *Walter Chetwynd*'s late Father. And that the ſaid *Walter Chetwynd* owed at the Time of his Death, by Bonds, the Sum of 1600l. and by ſimple Contract 2874: and that

his perſonal Eſtate then amounted to 13972l. and was ſuffi-
* P. 416. * cient to pay all the ſimple Contract Debts and Bond Debts of the ſaid *Walter Chetwynd*. And that the ſeveral real Eſtates ſo in Mortgage were of Value more than ſufficient to ſatisfy the ſeveral Incumbrances affecting the ſame. The Jury further find that on the 2d of *Auguſt* 1750, the ſaid *William Henry Chetwynd* filed his Bill in Chancery againſt the ſaid *William Windham*, &c, for the obtaining a Decree and Recovery of the ſaid Lands &c; and thereby conteſted the Validity and due Execution of the ſaid Paper Writings. That Anſwers were put in, and Amendments made to the Bill; and other Anſwers put in: And the ſaid *William Henry Chetwynd* proſecuted the ſaid Suit in Chancery with all due Diligence. The Jury further find that the ſaid *William Windham*, as Executor of the ſaid *Walter Chetwynd*, *paid to the ſaid Joſiah Higden* the ſaid Sum of 18l. 5s. 5d. *after the Death* of the ſaid *Walter Chetwynd* and *before the Examination* of the ſaid *Joſiah Higden* in this Cauſe: And that the ſaid *J. H.* had not, *at the Time of his Examination* in this Cauſe, any Demand upon the ſaid *Walter Chetwynd*. But whether upon the whole Matters aforeſaid by the Jurors in Form aforeſaid found, the ſaid Paper Writings or either of them were or was DULY EXECUTED by the ſaid *Walter Chetwynd*, ſo as to paſs Lands or Tenements, or not, the ſaid Jurors are wholly ignorant; And therefore pray the Advice, &c, &c.

This Caſe was argued twice; 1ſt. on *Friday* the ſixth of *May* laſt, by Sir *Richard Lloyd* for the Plaintiff, and Mr. *Clayton* for the Defendant; and again, on *Friday* the 18th Inſtant by Mr. Serjeant *Prime* for the Plaintiff, and Mr. *Norton* for the Defendant.

The principal Objection inſiſted upon by the Counſel for the Defendant, was "That the ſubſcribing Witneſſes to the "Will were not, at the *Time* of their ATTESTATION, *credible* "Witneſſes:" And conſequently, this was not a good Will of Lands, within the Statute of 29 *C.* 2. *c.* 3. for Prevention of Frauds and Perjuries; as not being atteſted by three *credible* Witneſſes.

In Proof of which, they urged many Arguments, and reaſoned from ſeveral Caſes: And, amongſt others, they cited two Caſes as in Point; *viz. Hilliard* v. *Jennings*, reported in 1 Ld. *Raym.* 505, *Comyns* 92, *Carthew* 514, and Caſes in *B. R. temp. W.* 3. *Page* 277; And *Holdfaſt ex dim' Anſtey et Ux'* v. *Dowſing*, in 2 *Strange* 1253.

† See a ſhort Summary of them, in Dr. Burn's Eccleſiaſtical Law, p. 532.

But it would be unneceſſary to prefix either the † Arguments of the Counſel, or the Authorities upon which they relied; As Lord *Mansfield* entered into the Caſe ſo very minutely, in delivering the Opinion of the Court upon it.

After the Court had taken ſome Time to conſider of it, they all agreed that the Will was *duly* atteſted by three *credible* Witneſſes. And now

LORD

* Lord Mansfield delivered the Opinion of the Court * P. 417.
to the following Effect,

The Doubt made by this ſpecial Verdict ſprung, after the Cauſe of *Anſty* v. *Dowſing*, out of the *general* Queſtion then much agitated, "Whether a Benefit given to a ſubſcribing "Witneſs by the Will, either under a general or particular "Deſcription, ſhould annul his Atteſtation, as *at the Time* "*of his* subscribing; and make the Will wholly and ab- "ſolutely void, for Want of Form, as much as if he had "never atteſted at all; *though at or after the Teſtator's* Death, "He might be *diſintereſted*, and *competent* to be examined in "Support of the Will."

This *general* Point is the Baſis of the Objection to theſe ſubſcribing Witneſſes. Unleſs the Defendant can ſupport it, He has no Ground to ſtand upon: But though he ſhould ſucceed in the *general* Propoſition, the Application to *this* Caſe may fail, from the *particular Circumſtances*, and the *kind* of Benefit objected.

The Queſtion does *not* depend upon the Conſtruction of any Words of the Statute. The Statute is ſilent as to the *Capacity* of the Witneſſes: It declares no Incapacity; it requires no Qualification.

The Epithet "*Credible*" has a clear preciſe Meaning. It is not a Term of Art appropriated only to legal Notions; but has a Signification univerſally received. It is never uſed as ſynonimous to *competent*. When applied to Teſtimony, it preſuppoſes the Evidence *given*.

After the Competence of a Witneſs is allowed, the Conſideration of his Credibility ariſes; and *not before*, Perſons undoubtedly credible *cannot* be Witneſſes, *under particular Circumſtances*: Perſons manifeſtly incredible *may* be, and *often are* Witneſſes.

In acts of Parliament which direct Convictions upon the Oaths of Witneſſes, the Epithet "*Credible*" is added; but by no Means intended to ſignify "Competent:" *That* is implied in the Term "Witneſs." But it is intended, (from abundant Caution) to declare, that though competent Witneſſes ſwear poſitively, their *Credibility is to be weighed*: And if the Magiſtrate thinks the Evidence *not credible*, he ought not to convict.

In *this* Senſe, it was very unneceſſary to add the Epithet, here, to ſubſcribing Witneſſes. And yet, to make the eſſential Solemnity of the Will depend upon the *Credibility* of the ſubſcribing Witneſſes, is ſo abſurd; that their Credibility has been always held to make *no Part* of the neceſſary Form.

If

* P. 418 * If they all ſwear that the Teſtator did not execute; If they had, at the Time, the worſt Characters, and had committed the moſt infamous Actions; yet their Atteſtation anſwers the neceſſary Form; Becauſe the Teſtator meant to comply with the Law, and might not know them to be bad Men.

The 3d Rule or Caution in making Wills, given at the
‡ 3 Co. 39. b End of *Butler* and *Baker*'s Caſe, ‡ is—"At the Time of the "Publication of the Will, Call *credible* Witneſſes to ſub-"ſcribe their Names to it." Lord *Coke* certainly meant "Perſons of Credit and Character."

From hence, and from the Uſage in Penal Acts directing Convictions, I am perſuaded that the Epithet was inſerted here, as a Word of Courſe, and miſapplied. Had the Operation or Effect of the Word, in this particular Caſe, been attended to, it never could have been inſerted; becauſe, in the *natural* and *obvious* Senſe, the Meaning muſt be rejected, from the Conſequences it would have: And in *any other*, it has no Meaning at all; For, Suppoſe it to ſignify *competent*, Competence is *implied* in the Term "Witneſſes.

This *whole* Clauſe, which introduces a poſitive Solemnity, to be obſerved, not by the Learned only, but by the Unlearned; at a Time when they are ſuppoſed to be without legal Advice; in a Matter which greatly intereſts every Proprietor of Land; where the Direction ſhould be plain to the *meaneſt* Capacity; is ſo looſe, that there is not a ſingle Branch of the Solemnity defined or deſcribed with ſufficient Certainty to convey the ſame Idea to the *greateſt* Capacities.

There have been Litigations, and contradictory Opinions, upon *almoſt every Part* of the Form; as "What is *Signing* "by the Teſtator? Whether the Witneſſes are to atteſt *uno* "Contextu, *uno eodemq*; Tempore? Whether they are to "*ſee* the Teſtator ſign? Whether they ought to know that He "ſigns it *as his Will*? Whether he ought to publiſh it *as* "his Will?" A very little Preciſion, and a very few Words, might have prevented all theſe Queſtions.

In a Clauſe not the moſt accurate, I can eaſily believe that the uſual Epithet "*Credible*" ſlipped in, as of Courſe, without Attention to the *Impropriety* of uſing it on this Occaſion.

It has been ſaid "that this Act of 29 *C.* 2. *c.* 3. was drawn "by Ld. Ch. J. *Hale*;" But this is ſcarce probable. It was not paſſed till after his Death: And it was brought in, in the Common Way; and not upon any Reference to the Judges.

But

* But what Senſe ſoever is put upon this Word "*Credible*," the Statute leaves the Queſtion juſt as it was: For it does not declare who *are*, or are *not* credible; or, (if it is ſuppoſed to mean *competent*) who are competent, or who are *incompetent*. * P. 419.

Their Competence could not be referred to any Law then eſtabliſhed: becauſe there was, there could be, none applicable throughout to this new Caſe. The Neceſſity of ſubſcribing Witneſſes to any Inſtrument, never had exiſted before, in *this* Country. There never could have ariſen, in the Law of *England*, a Queſtion, "concerning the Com-"petence of a Witneſs, at the Time of his knowing the "*Fact*, he came to teſtify;" but only "whether he was com-"petent at the Time of his *Examination*."

The Time of *Examination* could *not* poſſibly be the Criterion upon which the Validity of the Will was to depend. The Witneſſes might *not live* to be examined: Their Incompetence to be examined, might ariſe *long after* their Atteſtation.

"What Objection therefore to the ſubſcribing Witneſ-"ſes, ſhould be ſufficient to avoid a Will, as *informal*," was left to be judged of as Caſes ſhould ariſe; by general Principles, by Analogy to the Law of Witneſſes in other Inſtances, and by Arguments drawn from the Nature and Fitneſs of the Thing, with regard to Juſtice, Convenience, and the Intent of the Statute.

When ſolemn Determinations, acquieſced under, had ſettled preciſe Caſes, and become a Rule of Property; they ought, for the Sake of Certainty, to be obſerved, as if they had originally made a Part of the Text of the Statute.

I will therefore conſider the *General Queſtion*, in two Views:

1ſt, Suppoſing there had been *no judicial Determinations* relative to the Capacity of ſubſcribing Witneſſes ſince the Statutes:

2dly. Upon the *Foot of the judicial Determinations* that have been ſince the Statute. And

3dly. In the laſt Place, I will conſider the *particular Caſe* now in Judgment, under all its own Circumſtances.

Firſt—Conſidering the Matter *at large*; Let me obſerve that the Power of Deviſing ought to be favoured.

It is a natural Conſequence of Property, and the Right a Man has over his *own*. It was a Right by the Law of the Land,

* P. 420. * Land, before the Conqueſt, and down to about the Time of *Henry* the 2d—It ceaſed, conſequentially only, by the Introduction of Feodal Tenures; becauſe, originally, every Species of Alienation was contrary to that Syſtem.

As ſoon as the Power of Alienation *inter vivos* was indulged, Teſtaments followed, indirectly, as Declarations of Uſes.

The Statute of *Uſes* accidentally *checked* this Form of Deviſing. Therefore the Statute of *Wills* was made.

The 29 *Car.* 2. *c.* 3. (which gives a Riſe to the preſent Queſtion) did *not* mean to *reſtrain* Teſtamentary Diſpoſitions of Land; The Reaſons to encourage that Power were *increaſed*.

The Policy of Tenures, from whence aroſe the Impediment to Wills, was aboliſhed; but had left many Conſequences remaining, which made Teſtamentary Diſpoſitions of *Land*, more reaſonable than they were among the *Greeks* and *Romans*, or here before the Conqueſt.

The eldeſt Son only is Heir, *ab Inteſtato*. Among Collaterals, not all the next of kin, but one often is Heir; to the Excluſion of many in the ſame, and many in a nearer Degree. Simple contract Creditors had no Right to be paid their Debts. Money inveſted in Land could not be traced. Much Land was in Truſt: Where the Widow had no Right to Dower.

In *perſonal* Eſtates, the Succeſſion *ab Inteſtato* is ſubject to all Debts, and governed by natural Family Equity.

In *real* Eſtates, the Succeſſion is governed by political Conſequences of a poſitive Syſtem: Which make the Teſtamentary Power often neceſſary, to enable a Man to do Juſtice to his Family, and his Creditors.

The Legiſlature meant only to guard againſt Fraud, by a ſolemn Atteſtation; which they thought would ſoon be univerſally known, and might very eaſily be complied with. In Theory, this Atteſtation might ſeem a ſtrong Guard; it may be ſome Guard in Practice; but I am perſuaded many more fair Wills have been overturned for Want of the Form, than fraudulent have been prevented by introducing it.

I have had a good deal of Experience at the Delegates; and hardly recollect a Caſe of a forged or fraudulent Will, where it has not been ſolemnly atteſted. I have heard eminent Civilians who are dead, and ſome now living, make the ſame Obſervation.

Suppoſe

* Suppoſe the ſubſcribing Witneſſes honeſt; how little need they know? They do not know the Contents; they need not be together; they need not ſee the Teſtator ſign; (if he acknowledges his Hand, it is ſufficient;) They need not know it to be a Will: (If he delivers it as a Deed, it is ſufficient.) * P. 421.

For theſe and many more Reaſons, it is clear That Judges ſhould lean *againſt* Objections to the Formality. They have always done ſo, in every Conſtruction upon the *Words* of the Statute: *à fortiori* ought they to do ſo, in raiſing a conſequential Syſtem, *not* preſcribed in Words. And ſtill more ought they to do ſo, if that Syſtem would ſpread a Snare, in which many honeſt Wills muſt unavoidably be intangled; and be no Preſervative againſt Fraud.

At the Time this Act was made, the Law rejected no Witneſs to prove a Will; Unleſs, at the *Time of his Examination*, his Teſtimony tended to ſupport his own Title, and enable himſelf to hold or recover an Intereſt under it.

In the Eccleſiaſtical Court, the Probate is concluſive to every Body as to every Part. If a Legatee came to prove it, He intitled himſelf to his Legacy. But if the Legacy was contingent, and at the Teſtator's Death could not take Effect; if he had the ſame or a greater Intereſt, though the Will ſhould be ſet aſide; He was a Witneſs: A Releaſe, Payment, or Tender, made him a Witneſs.

In the Courts of Common Law, where the Witneſs had a Charge upon Land deviſed to another, He was juſt in the Caſe of a perſonal Legatee. If he had as great an Intereſt the other Way; if his Intereſt at the Teſtator's Death could never take Effect; if there was a Releaſe, (of which ſeveral Authorities were cited;) and I will add, as by neceſſary Conſequence, if there was Payment or Tender; He was a Witneſs.

Nine Objections, of a remote Intereſt which could not be paid or releaſed, though they held in other Caſes, were not allowed to diſqualify a Witneſs in the Caſe of a Will: As † Pariſhioners might prove a Deviſe to the Uſe of the Poor of the Pariſh for ever.

[† V. 2 Sid. 109. M. 1658 Townſend v. Row.]

Before the Statute, No Man could, in a Court of Juſtice, intitle himſelf by his own Examination, to a Deviſe. So, after the Statute, No Man ſhould intitle himſelf, in a Court of Juſtice, to a Deviſe, by Virtue of his own Subſcription, which at the Time of Subſcribing, He could not have proved by his Examination.

The

* P. 422. * The Diſability of a Witneſs from *Intereſt*, is very different from a *poſitive* Incapacity. If a Deed muſt be acknowledged before a Judge or Notary Public, Every other Perſon is under a *poſitive* Incapacity to authenticate it: But Objections of *Intereſt* are Deductions from natural Reaſon, and proceed upon a Preſumption of too great a Bias in the Mind of the Witneſs, and the public Utility of rejecting partial Teſtimony.

Preſumptions ſtand no longer than till the contrary is proved.

The Preſumption of Bias may be taken off, by ſhewing the Witneſs has as great, or a greater Intereſt the other Way: Or that he has given it up.

The Preſumption of public Utility, may be anſwered, by ſhewing that it would be very inconvenient, under the particular Circumſtances, not to receive ſuch Teſtimony.

Therefore from Neceſſity, the Courſe of Buſineſs, and other Reaſons of Expedience, Numberleſs *Exceptions* are allowed to the *general* Rule.

The Preſumption of Bias ariſes as at the Time of *ſubſcribing*. But it may be anſwered.—If Part is deviſed to a ſubſcribing Witneſs, The Preſumption is anſwered, by ſhewing he was Heir at Law; or that the Deviſe is void; or that he has renounced it.

Where is the Reaſon to ſay that a Witneſs who does not know the Contents of a Will during the Teſtator's Life, and at his Death takes no Benefit, was biaſſed at the Time he ſubſcribed, or can be biaſſed at the Time of his Examination?

During the Life of a Teſtator, Deviſes are mere Poſſibilities: No Intereſt can veſt till his Death. The Preſumption of Bias from the *Poſſibility*, is anſwered by the Fact when it *becomes* an Intereſt. His Swearing when he is totally *diſintereſted*, is concluſive, that the Poſſibility is *not* to be preſumed the corrupt Cauſe of his ſubſcribing.

For the Sake of third Perſons, It is wiſe and juſt, to allow the Objections thus to be purged: Otherwiſe, many Settlements by Will muſt be overturned, to the Ruin of Families.

It is natural and uſual to give Legacies to Servants, and Tokens to Friends.—Perſons under theſe Deſcriptions are moſt like to be Witneſſes. Ought ſuch Trifles to overturn *unavoidably* the moſt deliberate Diſpoſitions of the greateſt Eſtates? Which may be attended often with this Family Diſtreſs,

* Diſtreſs, That a Man may have given his Money to One Part of his Family, and his Land to Another: In which Caſe, the Will would be good as to the Money; and void as to the Land. * P. 423.

If the Legiſlature had *ſaid ſo*, That would have been a *poſitive* Rule: But it is contended for, by *Conſtruction*, and to *guard againſt Fraud*.

It is not a Guard, even in Theory, in the Caſe of *Legatees*: Becauſe, they may, in another Shape, atteſt the Deviſe which charges the Land with their Legacies.

It is ſettled, "That where the Land is once charged, (and it always is an auxiliary Fund,) with the Payment of Legacies, by a ſolemn Deviſe, the Legacies may be given, altered, or revoked by a ſubſequent Will *unatteſted*." The fraudulent Legatee might atteſt the Charge, and get his Legacy in a Codicil unatteſted.

Let a Will be ever ſo fair, a Slip in Form is fatal: Which is a certain Miſchief. But if a Will be fraudulent; though it is allowed to be formal, It may be ſet aſide upon Evidence and Circumſtances.

Neither Reaſon, nor Policy require the Objection to be carried farther than I have laid it down; agreeable to the Law before the Statute, and the univerſal Maxim, "Teſtis "in *propriâ* Cauſâ non eſt adhibendus."

But *if* Judicial Determinations, acquieſced under, and become a Rule of Property, ſince the Statute, have *extended the Incapacity* further, They muſt be adhered to. Which brings me

Secondly, To conſider the *Judicial Determinations* ſince the Statute.

All the Determinations *agree exactly* with theſe Principles.

In many Inſtances, the Preſumption of *Bias from a Legacy*, at the Time of ſubſcribing, has been allowed to be *taken off* by a *Releaſe*. Authorities in print have been cited, to ſhew "this was conſidered as a ſettled Point:" And I verily believe it was ſo, from the Authority of the oldeſt and moſt eminent Practiſers in *Weſtminſter-Hall*; and therefore I give Credit to the Dictum of *Powys* in *Viner*, ‡ "That it had been ſolemnly agreed by the Judges, That, where a "Perſon had a Legacy given, and did *releaſe it*, He was a *good* Witneſs to prove the Will."

‡ See Viner's Abridgment, Title Evidence, page 14. No. 53.

I know

* P. 424. * I know that before the Caſe of *Anſly* v. *Dowſing*, a Will of a very great Eſtate was liable to the Objection; and the Heir at Law would have conteſted it: But as it was certain the Witneſſes would be paid, or releaſe, No Opinion that he took, encouraged Him to think it worth his while.

Mr. *Fazakerly* and Sir *Thomas Bootle* have told me, they took it to be ſettled: And indeed the Number of Wills where the Objection lay and never was taken, demonſtrated it.

There is not a ſingle Determination which carries the Incapacity further than the Rule I have laid down; *viz.* "That a Perſon ſhall not, in a Court of Juſtice, intitle "himſelf to a Deviſe, by Virtue of his own Subſcription, "which at the Time of ſubſcribing He could not have "proved by his Examination."

That is the Caſe of *Hilliard* v. *Jennings*. That is the Reſolution and Judgment of the Court in the Caſe of *Anſly* v. *Dowſing*. There, the Defendant was a Deviſee; ſubject to an Annuity of 20l. a Year to *Eliz.* the Wife of *John Hailes*, for her Life, for her ſeparate Uſe; And there did not appear to be any perſonal Eſtate. Her Intereſt was a Charge, in the Nature of Legacy, to be paid by the Defendant out of the Eſtate deviſed to him: And being for her ſeparate Uſe, it was a Truſt; and the Defendant was her Truſtee. Upon the Validity of the Deviſe to the Defendant, Her Annuity *depended*. If he ſucceeded, *her* Title followed of Courſe; for he muſt take the Land, *as* the Teſtator gave it, ſubject to the Charge and Truſt: And upon the Deviſe to the Defendant being found good at Law, a Court of Equity muſt, of Courſe, have decreed the Truſt. So that *She* was the *Ceſtuy qui Truſt* of the *Party to the Cauſe*; and *either* Way, the Judgment would immediately *affect her intereſt*.

In Matter of Evidence, *Huſband and Wife*, are conſidered as *One*; and *cannot be Witneſſes*, the *one*, for the *other*. The Huſband cannot be Witneſs *for his Wife*, in a Queſtion touching her *ſeparate* Eſtate.

There was *no Releaſe*. There could be *no Payment*, or *Tender*, without the Interpoſition of a Court of Juſtice; becauſe the Value depended upon incertain Eſtimation: But no Attempt had been there made towards paying, or tendering the Value of the Annuity.

This brought it preciſely to the Caſe of *Hilliard* v. *Jennings*: The Witneſs, in a Court of Juſtice, was to ſupport a Deviſe to himſelf, by Virtue of his *own* Subſcription; (for the

*the Caſe is the ſame, as if the *Wife* had been the *Witneſs*, or the *Huſband* the *Deviſee* of the Annuity.) * P. 425.

It is true that Ld. Ch. J. *Lee*, in *delivering his Opinion, argued as if the Objection of Benefit from the Will to the Witneſs, at the Time of ſubſcribing, could *not* be anſwered or taken off by any ſubſequent Fact: Which He grounded upon the Authority of the *Roman* Law from the Digeſt, and Code; where it is ſaid "*Conditionem* Teſtium *tunc* inſpicere "debemus, *cùm ſignarent*, non mortis Tempore." But the Senſe of this Paſſage was not enough conſidered. *That Opinion was delivered by Ld. Ch. J. Lee, on Tueſday 22d April 1746. P. 1. 9. G. 2.

"*Conditio Teſtium*" here means the *poſitive Capacity* of the Witneſſes; their Rank, or Quality, as Freemen, Citizens, Adult.

There *never* was a Time, in the *Roman* Law, when *Intereſt under the Will* was any Objection to ſubſcribing Witneſſes.

To explain this a little farther—

The Eſſence of the *Roman* Teſtament was the Appointment of an Heir, to repreſent the Teſtator.

Before the 12 Tables, the Teſtamentary Heir might be made *Two* Ways: *in Procinctù*, as *Plutarch* deſcribes at the Siege of *Corioli*; or in the Form of a Legiſlative Act, in *Comitiis calatis*.

The 12 Tables gave an abſolute Power to every Man, to make the Law of his own Succeſſion: But preſcribed *no Form*.

As a Teſtament was an Alienation of the Teſtator's Property and Family after his Death, The Form of Mancipation *per Æs et Libram*, uſed in *other* Transfers of Property or Family, was followed in *this*: The Heir was ſuppoſed to *buy*, and the Teſtator to *ſell* his Succeſſion and Family, for and as repreſenting their Families. The Ceremony was tranſacted with all the Symbols of a *Sale*; in the Preſence of the Officer who held the Balance, and of *Five* Freemen, Citizens of *Rome*, 14 Years of Age at leaſt, ſolemnly required to bear Witneſs.

Theſe Ceremonies and Symbols were invented *before* Inſtruments in *Writing*: And this imaginary Sale, *per Æs et Libram*, was uſed in Alienations, Adoptions, and almoſt every Species of Change of Dominion, or Property ſtrictly ſo called, ("*Proprium eſt quod Quis Libra mercatur et Ære,*") and in many other Contracts.

Subſequent Laws and Uſages, eſpecially *after* Teſtaments came to be in *Writing*, took away the Ceremony of the *Symbolical* Sale, added *two* Witneſſes more, and preſcribed *Forms*

of

* P. 426. * *of Atteſtation*; But left the *Condition of the Witneſſes*, the ſame: They muſt be Freemen, *Roman* Citizens, Adult & *Teſtabiles*. Yet by an equitable Conſtruction, *General Reputation* was ſufficient: As where the Witneſs, whom *Every Body conſidered* as a Freeman, really was a Slave.

This was the *Conditio Teſtium*, and muſt *exiſt at the Time of ſubſcribing*: As much as where there is a Cuſtom to ſurrender into the Hands of 2 Copyholders out of Court, they muſt be Copyholders *at the Time*.

Though in *other* Caſes, the Objection of *Intereſt*, to a Witneſs was allowed; It did not incapacitate Witneſſes to a WILL.

While the Teſtament *per Æs et Libram* continued, neither the Teſtator, or Heir, or any of the Families of either, could be Witneſſes; becauſe they were ſuppoſed the *Parties* to the Contract.

When the Symbolical Sale ceaſed, and Teſtaments were *in Writing* and *ſecret*, The *Heir Himſelf* was a ſufficient ſubſcribing Witneſs. Afterwards, though the Will was *open*, and He *knew* the Contents, *He* was a ſufficient ſubſcribing Witneſs: As appears from *Cicero* for *Milo*, ſpeaking of *Cyrus*†—"*Unà fui*; *Teſtamentum ſimùl* obſignavi cum Clo-"dio; *Teſtamentum autem* palam *fecerat*, & illum Hære-"dem & Me *ſcripſerat*."

† 6 Vol. 4to. Oliv. Edit. pa. 253. Sect. 18.

Juſtinian Inſt. Lib. 2. Tit. 10. § 10. recites the *Heir having been allowed* to be a Witneſs; but forbids it (not upon the Foot of his being intereſted, but) "*ad imitationem priſ-*"*tini familiæ Emptoris*; *quia hoc totum Negotium, Teſtamen-*"*ti ordinandi gratia, creditur hodie inter Teſtatorem & Hæ-*"*redem agi.*" But in the next Section (§ 11.) He expreſsly allows the *Ceſtuy qui Truſt*, and *Legatees*, to be ſubſcribing Witneſſes; "*Quia non Juris Succeſſores ſunt.*" And yet the Heir *might be* merely a Truſtee for the whole Inheritance to be delivered to the *Ceſtuy qui Truſt*; and the Legatee *might* exhauſt the whole Eſtate.

This abundantly ſhews that the Paſſage from the Code and Digeſt did *not* relate to Witneſſes being INTERESTED.

And the Code and Digeſt are conſiſtent with the Inſtitutes, on this Head.

The Code, Digeſt, and Inſtitutes are all one connected Work.

The Code was firſt publiſhed in the third Year of *Juſtinian*: The Digeſt was compiled before the Inſtitutes; but publiſhed a Month after, in the ſeventh Year of *Juſtinian*.

The

* The Propoſition, "that *any kind of Intereſt*, at the * P. 427.
'*Time of ſubſcribing*, could *not* afterwards be taken off;" and the Application of this Paſſage in ſupport of it, was much agitated in *Weſtminſter-Hall* and the whole Kingdom.

A Gentleman at the Bar, purſuing the Propoſition through all its Conſequences, hit upon this Point—"That *a Charge* "*upon Land* for Payment of *Debts*, would defeat the Will, "if a ſubſcribing Witneſs, was a *Creditor* at the *Time of* "*Subſcribing*." As ſoon as it occurred to him, He mentioned it to Me. There had been *many* ſuch Deviſes: But the Queſtion, "Whether the Witneſs was a Creditor," *never had been aſked* at Law; nor by Interrogatories in Chancery, framed to eſtabliſh or impeach a Will.

If the General Rule was right, the Deduction ſeemed very plauſible.

He put this Point in Iſſue, in Chancery; and examined to it, in Behalf of the Heir, in ſeveral Caſes. Lord *Hereford*'s Will was one of the firſt: *This* was another.

A Caſe ſoon happened which brought the General Propoſition flung out by Ld. Ch. J. *Lee*, under *Judicial* Examination. On the 10th of *February* 1746, The Earl of *Aileſbury* died; having made a Will, 15th *May* 1746, * of his whole Eſtate real and perſonal, charged with Debts and *Legacies*: The Three ſubſcribing Witneſſes, as being in his Service at his Death, had *Legacies*; One, 30l. a Year for Life; the other two, pecuniary Legacies. All three *releaſed*, the 12th of *February* 1746.

* I believe this is right; notwithſtanding the Correction of the Editor of Lord Camden's Argument, in his pa. 21. of his 1ſt. part. N. B. May 1746 was prior in time, to February 1746.

He had made a former Will, on the 20th of *December* 1744, atteſted by 3 diſintereſted Perſons; under which, the 3 Subſcribing Witneſſes to the laſt Will would have had the *ſame* Legacies.

A Bill was brought in Chancery, to have the latter Will eſtabliſhed, notwithſtanding this Doubt; and ſtating the whole Matter. Notwithſtanding the Will of 1744, which, the Teſtator had revoked, (as He thought, effectually,) and might probably have cancelled; It was a Benefit to the Witneſs, *at the Time of Subſcribing*, to have a Legacy under the *laſt* Will.

The Cauſe came on to be heard, the 5th of *November* 1748. And I was of Counſel in it.

I had taken the Liberty to aſk Mr. Juſtice *Deniſon*, "Whe-"ther the Judgment of the Court, in the Caſe of *Anſly* v. "*Dowſing*

* P. 428. *" *Dowſing* went upon the *General* Propoſition." He told me it did *not*; but upon the *particular Circumſtances*. As to himſelf, He was *not* of Opinion, " that an Objection of " Benefit, at the Time of Subſcribing, *might not be taken* " *off*, by being diſintereſted, at, or after the Death."

I mentioned this to the Lord Chancellor, who had got from Ld. Ch. Juſtice *Lee*, a Copy of the Opinion He delivered; And He was, clear, " *they were good Witneſſes*." At the *Death* of the Teſtator, it was indifferent to them, *which* Will prevailed: Beſides, they had *releaſed*. He declared the laſt Will, of the 15th of *May* 1746, to be *well proved, eſtabliſhed it*, and *decreed the Truſts*.

There is another Matter touched in that Opinion delivered by Ld. Chief Juſt. *Lee*, which interferes with the Rule I have laid down, in its *full* Extent: *viz.* " That a ſub- " ſcribing Witneſs who is a *ſeveral Deviſee*, which Deviſe " *as to him* muſt be void, ſhall not by his Subſcription au- " thenticate the *Reſt* of the Will." But, for this, no Authority is cited. In the Caſe of *Hilliard* v. *Jennings*, the whole Land was deviſed to *William Hilliard*. And I am ſatisfied that Ld. Ch. J. *Holt* took the Diſtinction, " That the " Will might be only void, *quoad the* DEVISE *to the Witneſs*:" Becauſe *Carthew*, [*pa.* 514.] who was Counſel in the Caſe, and has reported it the moſt correctly, *hints* an Expreſſion of that kind, *viz.* " That it was void *quoad* the Deviſe of the " Lands to the Plaintiff;" And Ld. *Raymond*, in the Caſe of † *Baugh* v. *Holloway*, ſays *expreſsly*, " That Ld. Ch. J. " *Holt* ſo determined."

† 1 Peere Wms. 557, 558.

The Validity of the Will, as to the *Perſonal* Eſtate, was not before the Court, and never could come before the Court, becauſe *that* Queſtion belonged to another Juriſdiction. The Caſe in Judgment was of a Deviſe to the Witneſs *only*. Ld. Ch. J. *Holt* might, very properly, throw out ſomething to guard againſt Inferences from their preſent Determination, to the Caſe of a Deviſe to a *third* Perſon.

I have looked into the Regiſter-Book, for that Caſe of *Baugh* and *Holloway*; and find the State of it to be this— *Richard Baugh* died, leaving *Elizabeth* his Wife, and two Sons, named *John* and *George*; having firſt made his Will, dated 11th *June* 1707, whereby he deviſed certain Premiſſes to his youngeſt Son *George* his Heirs and Aſſigns, charged with the Payment of 200l. which was due on Bond to *Lancelot Baugh*, the Teſtator's younger Brother. And the ſaid Teſtator alſo deviſed certain other Lands, to the ſaid *George*, with a Proviſo, that on the ſaid *George's attaining* 21 and having 1000l. paid him, then all the ſaid Premiſſes ſhould return to his eldeſt Son *John*. And in Caſe both his

* his ſaid Sons ſhould die under 21 and unmarried, then the ſaid Teſtator deviſed the ſaid firſt mentioned Premiſſes to his Wife *Elizabeth* her Heirs and Aſſigns, charged with the Payment of the ſaid 200l. to the ſaid *Lancelot Baugh*, and alſo with the Payment of 150l. to the ſaid *Lancelot Baugh*'s Children; and deviſed the ſaid laſt mentioned Premiſſes to his Brother *Edward Baugh* his Heirs and Aſſigns. Both the Teſtator's ſaid Sons died without Iſſue, under Age: And *Elizabeth Baugh* poſſeſſed and enjoyed the ſaid Premiſſes under the ſaid Will, and afterwards died, 20th *October*, 1714: having firſt made her Will, and deviſed the ſaid firſt mentioned Premiſſes to *Catharine Rawlins*, charged with the Payment of her Debts, and alſo ſubject to the ſaid Charge made by her Huſband's Will. *Catharine Rawlins* entered, and enjoyed the ſaid Premiſſes, and died; having made her Will dated 26th *May*, 1716, and deviſed the ſaid Premiſſes to *Anne Oxenden* and *Elizabeth Holloway* as Tenants in Common, charged with the Payment of the Debts and Legacies appointed to be paid thereout by the ſaid *Richard Baugh*, and alſo of the Debts, &c. of the ſaid *Elizabeth* unſatisfied by the ſaid *Catherine Rawlins*. The ſaid *Anne Oxenden* and *Eliz. Holloway* claimed the ſaid Premiſſes, as only Children of *John Holloway* by *Anne* his Wife, and as Coheirs at Law of the ſaid *Eliz. Baugh* and *Cath. Rawlins*. *Lancelot Baugh* filed his Bill, and claimed as Uncle and Heir at Law of *John Baugh* the ſurviving Son of his Brother *Richard Baugh*; thereby impeaching his ſaid Brother's Will. * P. 429.

The Order is ſtated right in 1 *Peere Wms.* 558: And on ſearching the Regiſter's Book, it could not be found to have come on again. Therefore it is reaſonable to think the Heir muſt have been adviſed to drop it.

Deviſes of Lands differ extremely from *Wills*. They are no Appointment of an Heir; They create no Repreſentation; The Deviſee does not ſtand in the Place of the Deviſor, as to ſimple contract Debts; and till the * Statute of King *William*, the Deviſee was not liable to Specialty Debts, (becauſe he was conſidered as an Alienee, and not as the Heir.) They are Conveyances or Diſpoſitions *Mortis Cauſâ*: And that is the Reaſon why a Man cannot deviſe Land which he ſhall afterwards acquire. * 3, 4 W. & M. c. 14.

One Deviſe may be void, (as in the Caſe of this very Will;) and the Deviſe of another Eſtate, good. There is no Probate of the whole Inſtrument: Every ſeveral Deviſee muſt make out his Title, in a diſtinct Cauſe, and *de novo*, againſt every new Party.

Upon legal Principles, there is great Weight in the Diſtinction ſaid to have been made by Ld. Ch. J. *Holt*: And the Authors referred to by *Swinburne* are ſtrong, upon the Reaſon and Fitneſs of the Thing.

* P. 430. † By contriving to atteſt, each for the three others, as to the Lands deviſed to thoſe others; though none of them could be a good Witneſs as to the Deviſe to Himſelf.

* The Danger of Fraud, from the Imagination "that "four Witneſſes might † divide the Eſtate among them," ſeems very chimerical. That very *Contrivance* would overturn the Will. If it would not: they might as well execute their Scheme, by four Deviſes, in four Paragraphs, ſeverally atteſted.

Thirdly—In the third and laſt Place, I propoſed to conſider the preſent Caſe under its *own* Circumſtances.

Theſe Witneſſes are in the Nature of *Legatees*; not ſeveral *Deviſees*.

The Preſumption of "Intereſt at the Time of *Subſcription*" is *taken off*, at the *Death*, by the principal Funds being more than ſufficient: It is taken off, *before the Trial*, by the Debts being *paid*.

But the Benefit at the Time of ſubſcribing was *Nothing*. It does not appear the principal Funds *then* were deficient. The Legacy is a *bare Poſſibility*, upon a Contingency; which Contingency *never happened*.

But I will go farther, I think a *Charge* "*to pay Debts*" ought *not* to incapacitate ſubſcribing Witneſſes; *although* they wanted and claimed the Benefit of it. Every Honeſt Man ſhould make that Charge in his Will: He who omits it, is ſaid to ſin in his Grave.

Fraud cannot be preſumed, from inſerting a Clauſe which it would be iniquitous *not* to put in.

No Man would reſort to wicked and fraudulent Practices, to get his Debt charged upon Land by the *Will* of his Debtor: If he ſuſpected the Debtor's Circumſtances, He would not ſtay till his Death or truſt to a *revocable* Security.

The Preſumption of Frauds in this Caſe would be againſt Juſtice and Truth; and the public Inconvenience ſo great, that hardly a Will could ſtand.

This Charge ought to be in every Will.

The Perſon Attendant upon a dying Teſtator, and therefore moſt common Witneſſes, are generally in *ſome* Degree *Creditors*; ſuch as Servants, Parſon, Attorney, Apothecary, *&c*: And the diſallowing ſuch Perſons to be Witneſſes cannot anſwer Ends of public Utility.

Upon

* Upon the Whole We are all of Opinion that this Will is *duly* atteſted by three Witneſſes. * P. 431.

JUDGMENT for the PLAINTIFF.

Rex *verſus* Strong.

MR. *Clayton* had moved (on the 19th Inſtant) That the Defendant might be at Liberty (without paying any Coſts) *to pay into Court* 40*s.* being the *Penalty* for his *exerciſing the Trade* of a Grocer, for the Space of one Month, contrary to 5 *Eliz. c.* 4; whereof he had been convicted upon an Indictment found at the laſt *Cumberland* Aſſizes; (which Proceedings the Defendant had removed hither by *Certiorari*;) And that thereupon the *Recognizance* might be *diſcharged*: And He founded his Motion upon the Authority of *Rex* v. *French*, *Paſch.* 24 *G.* 2. *B. R. Rex* v. *Fiſher*, *Tr.* 24 *G.* 2. *B. R.* (Both, on the Motion of Mr. *Ford)* in which Caſes this was done; becauſe by 5, 6 *W. & M. c.* 11. §. 3. No Coſts are payable, *but* upon Indictments brought by the *Party grieved*, or upon Proſecutions by Juſtices, *&c.* or other civil Officers proſecuting *as ſuch*. And ſo it was alſo, in a former Caſe, of *Rex* v. *Mary Incledon*, *M.* 20 *G.* 2. *B. R.* A Rule was made to ſhew Cauſe. And now, Mr. *Norton* not objecting to this Motion, (being ſatisfied with the Caſes cited—)

The ſaid RULE was made ABSOLUTE.

Jenkin *verſus* Whitehouſe and another.

MR. *Madocks* moved for a *Prohibition* to the Conſiſtory Court of the Biſhop of *Coventry* and *Litchfield*, to ſtay Proceedings in a Cauſe there, relating to the WILL of a MARRIED WOMAN, who was a Midwife by Profeſſion, and had, by her Marriage-Settlement, a Power given Her *to make a Will* for the Diſpoſition of her perſonal Gains in that Profeſſion. He ſaid this was *not a* WILL, properly ſpeaking: A *Feme Covert* can *not* make a Will; And cited 1 *Mod.* 211. Anonymous, as in Point. Alſo in a Caſe of *Rex* v. Dr. *Betteſworth*, upon the Application of *Miles Barnes*, Eſq; againſt *Diana Robſon*, Daughter of *Diana Elwick* formerly *Diana Robſon* and late Wife of Governor *Elwick*, on 27th *November* 1751. *M.* 25 *G.* 2. *B. R.* this Court agreed "that "the Spiritual Court could *not* treat it as a Will, by grant-"ing *Probate* of it;" though it is true, in that Caſe, the

P. 432. * Court did not even make a Rule " to ſhew Cauſe why a " Prohibition ſhould not go ;" Becauſe they thought the Spiritual Court had taken the right Method, *viz. annexing* the Paper or Inſtrument purporting to be Mrs. *Elwick*'s Will, to an Adminiſtration granted to her ſaid Daughter Mrs. *Diana Robſon*, upon the Renunciation of the Executors. And ſo 1 *Salk.* 313. *Shardelow* v. *Naylor*; and *Farreſley* 147. S. C. ſhews " that this is not a Will, nor proveable by the " Ordinary."

And the Caſe of *Burnet* v. *Holgrave* in *Equity Caſes Abr. Pa.* 296. ſhews that this is not in its own Nature *teſtamentary*.

And He ſaid that the *Adminiſtration* granted to the Huſband, had been brought *into the Spiritual Court, pendente lite* there: Which He prayed might be RE-DELIVERED to him ; and that this laſt Clauſe might be added to the Rule.

LORD MANSFIELD—That is going too far : We will not add *that*.

* 5th July 1744. In a Cauſe of *Roſs* v. *Ewer*, in Chancery, * there was a Power to a Feme Covert ; " to appoint *by Will*." Lord Chancellor held clearly, " though ſuch Will operates as an " Appointment, it *muſt be proved* in the Spiritual Court :" And he would not proceed till the Will was ſo *proved*. It was not material for him to conſider of the *preciſe Form* in which it was to be *proved*; whether by a *ſtrict Probate*, or by granting Adminiſtration with the Appointment in Nature of a Will *annexed* : And therefore *that* Point was not entered into. But the *Fact*, " that the Paper *was* her Will, in Caſe ſhe had a " Power to make one," muſt be *eſtabliſhed by the Eccleſiaſtical* Court : For ſuch an Appointment is in the *Nature* of a Will, and attended with all the *Conſequences* of a Will.

As to the Determination in the Caſe of *Burnet* v. *Holgrave*, " that Money appointed, under the Execution of a Power, " by ſuch a Will ſhould not lapſe ;" It was very fully conſidered, and contradicted in the Cauſe of the Duke of *Marlborough* againſt the Earl of *Carliſle*, Earl *Godolphin*, and Others, † 26th Nov. 1750. in † Chancery.

The Caſes cited or referred to by Mr. *Madocks*, ſhew that *Adminiſtration may be granted*, with the Appointment *annexed* : Which proves it to be *teſtamentary*. For nothing can be *annexed* to an Adminiſtration, but a *teſtamentary* Diſpoſition : Which is proved and eſtabliſhed by the Eccleſiaſtical Court in *that* Form.

But if the Queſtion be, " Whether the Wife *had a Power* " to make an Appointment in the Nature of a Will, and " thereby to deprive the Huſband of any Benefit which " by Law would devolve upon him in Conſequence of " her

* "her Death," *That* is a Queſtion proper to be conſidered here: And if ſhe had *no* ſuch Power, this Court will grant a Prohibition. And *ſo far*, the Caſe in 1 *Mod.* 211, cited by Mr. *Madocks*, goes expreſsly. * P. 433.

It ſeems right, therefore, to grant a Rule "to ſhew "Cauſe why there ſhould not be a Prohibition:" And then the Caſe will be better underſtood, under all its Circumſtance.

The COURT granted a Rule to ſhew Cauſe: But it never came on again.

Rex *verſus* Stephens.

Saturday, 26th Nov. 1757.

MR. *Cox* moved for an Information in Nature of a *Quo warranto* againſt the Defendant *John Stephens* Eſq; to ſhew by what Authority he acted as one of the Aldermen of the Corporation of St. *Ives* in *Cornwall*.

The Fact upon which the Information was prayed, was the Defect of the Defendant's Title: Which ſtood as follows——

John Noall was elected Alderman in *June* 1728, WITHOUT *being then a Burgeſs or Aſſiſtant*; (which was a neceſſary *previous* Qualification:) And the ſaid *John Noall* was, the next Year, elected Mayor. And all the ſucceeding Mayors and Aldermen were elected UNDER *Noall and his Succeſſors* in the Mayoralty, (Each, *under* his reſpective Predeceſſor;) and likewiſe *by* Aldermen claiming under *Noall*'s ſaid *defective* Election; till in *September* 1741, the DEFENDANT *was elected Alderman*, BY ſuch DEFECTIVE *Electors* as aforeſaid; and in *November* 1742, he was, by the like and no better Authority, elected *Mayor*. And it was ſworn that by the Conſtitution of the ſaid Burrough, there CAN *be no* DUE *Election*, of a Mayor or Alderman, without a *legal* Mayor preſiding at ſuch Election.

Note.—*Noall* died, a Year ago, in *quiet Poſſeſſion* of his Office of *Alderman*.

The COURT were clear and unanimous in REFUSING *to grant* this Information; by Reaſon of the STALENESS of the Defect of Title, aſſigned as the Foundation for it; which was of no leſs than 29 Years ſtanding. For they thought it would be of very ill Conſequence to Corporations, if the Court ſhould, AFTER *ſo many* Years Acquieſcence, QUIETA *movere*, and call Corporators to account for acting under ſuch Elections, depending upon the prior Rights of Others, whoſe

* P. 434. whoſe Rights had *never* been before objected to: Which muſt occaſion infinite Confuſion in Corporations.

† V. poſt. p. 1662. 17th Nov. 1796, the Winchelſea Cauſes—it was fixed to twenty ars.

And they ſaid that though there was indeed no Statute nor even † *fixed Rule* of Limitation, as to the Length of Time which ſhould ſuffice to quiet the Poſſeſſors of theſe Offices, yet the Court, in their Diſcretion, ought to refuſe granting theſe Motions, after a great Length of Time.

And Lord Mansfield obſerved that there was no direct and expreſs Limitation of Time, when a *Bond* ſhould be ſuppoſed to have been ſatisfied: The General Time indeed was commonly taken to be about 20 Years; but He had known Lord *Raymond* leave it to a Jury upon 18 Years.

Mr. Juſt. Foster mentioned a Caſe of *Malmeſbury*, not ſo ſtrong as this Caſe: Where an Information was denied.§

§ In a Caſe of Rex. v. Mayor of Bridgwater, M. 6. G. 1 B. R. An Information was refuſed, after 35 Years Acquieſcence under the New Charter.

‡ But the Leominſter Caſe (which was Rex v. Spencer, 1ſt June 1741. 14. Tr. 14, 15 G. 2. B. R. was not determined upon this Point; far from it, indeed:) it was refuſed for the Inſufficiency of the Affidavit, and not properly proving the By-Law on which the Motion was grounded.

And Mr. Juſt. Denison mentioned a like Caſe in ‡ *Leominſter*: In which He himſelf was Counſel.

Per Cur. unanimouſly
The Motion was denied.

Rex *verſus* Inhabitants of Lower Swell.

See this Case *abridged*, in the Table; and *at large*, in the Quarto Edition of my Settlement Cases, No. 140. p. 436.

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* P. 436. Cockerill, Aſſignee, *verſus* Owſton.

Monday, 28th Nov. 1757. THE Queſtion was Whether a *Bankrupt's Certificate*, obtained after Judgment in an Action *upon a Bail-Bond*, againſt the Bankrupt himself, (For the Bail were *not*

not at all concerned in this Motion) ſhould *diſcharge the Bankrupt* FROM THIS *Judgment upon the* BAIL-BOND, as well as from the *original* Debt: (which the Plaintiff's Counſel agreed that it *did* diſcharge him from.)

Note—The Defendant had paid the Money into the Sheriff's Hands, upon being taken up by a *Ca. Sa*, in Order to procure his Liberty. So that the Motion was "That the Money might be reſtored to the Defendant, with Coſts." And the Court had granted a Rule "to ſhew Cauſe," upon Mr. *Luke Robinſon*'s Motion: Againſt which Rule, Mr. *Clayton* now ſhewed Cauſe.

The COURT held that the Certificate *obtained ſubſequent* to the bringing of this Action upon the Bail-Bond, (though ſuch Certificate was founded upon an Act of Bankruptcy *prior* to the bringing this Action upon the Bail-Bond) did NOT *diſcharge the Bail-Bond*; although it diſcharged the *original* Debt: For that this was a *new* and *diſtinct Cauſe of Action.*

Indeed ſuch Certificate ſhall diſcharge the Proceedings depending *againſt Bail* in an Action upon the old Debt, *who are* NOT *already* FIXED: So it has been lately determined. *V. ante, p.* 244. *Woolley* v. *Cobbe & al.* (Which is the Caſe they hinted at.)

RULE DISCHARGED: And ordered that the Sheriff pay the Money to the PLAINTIFF.

The End of *Michaelmas* Term 1757. 31 *Geo.* 2.

Hilary

* P. 437.

* Hilary Term

31 Geo. 2. B. R. 1758.

Thurſday 26 January 1758.

Roſe *verſus* Green.

THIS Caſe came before the Court upon a Reſervation by Lord *Mansfield* at *Niſi Prius* at *Guildhall*, for the Opinion of the Court "Whether the Defendant became a "Bankrupt, on the 31ſt of *March*, or on the 6th of *May*:" Which particular Day was to be indorſed upon the *Poſtea*, agreeably to ſuch Opinion.

This Mr. *Green* having been *arreſted for Debt in* KENT, on the 31ſt of *March*, was afterwards on the 6th of *May* following, brought up by an *Habeas Corpus*, in order to be turned over; and, on the Road to the Judge's Chamber, was permitted (at the Deſire of himſelf and his Father) to call at his Attorney's Houſe (Mr. *Penfold*'s) upon *Garlick Hill* in the City of *London*, which was OUT *of the* COUNTY *of Kent*; and was carried thence, (by a *Habeas Corpus*) directly to a Judge's Chamber, to be bailed; and accordingly was bailed, but was INSTANTLY *there ſurrendered* by his Bail, in Diſcharge of themſelves, who had juſt before bailed him: and thereupon *committed*, EO INSTANTI, *to the King's Bench Priſon*, where he lay above two Months, *viz.* from the ſaid 6th of *May* till the 11th of *July* next following.

Sir *Richard Lloyd*. Mr. *Caldecott*, and Mr *Bainham* argued that this was an Act of Bankruptcy *from the Time* of the *firſt* Arreſt, taking it either of theſe two Ways; *viz.* either 1ſt, As *a* LYING IN PRISON *two Months* after having been arreſted for Debt; (under 21 *J.* 1. *c.* 19. § 2.) Or 2dly, As *an* ESCAPE out of Priſon, (under the ſame Clauſe) this Arreſt being for above the Sum of 100l.

1ſt. If

* 1ſt. If a Trader ſurrenders himſelf in *diſcharge* of his Bail, and *then* lies two Months, it is a Bankruptcy from the *firſt* Arreſt. *Smith* v. *Stracy*, 2 *Ann.* 1 *Salk.* 110. at *Niſi prius* at *Guildhall*—Ld. Ch. J. *Holt* ſo inclined, and gave his Reaſon for it: Which Caſe was ſubſequent to the Caſe of *Came* v. *Coleman* in 1 *Salk.* 109. (where indeed the Court held otherwiſe.) *Tribe* v. *Webber*, *P.* 17 *G.* 2. *C. B.* was a Diſtance of more than *Nine Months between* the Putting in Bail, and the Surrender. * P. 438.

2dly. His being *in London* was an ESCAPE: And the Debt being *above* 100l. this *Eſcape* is an Act of Bankruptcy *from the firſt Arreſt.*

Mr. *Norton* and Mr. *Furrell*, *contra.*—The Queſtion upon the Caſe ſtated at the Trial, and reſerved for the Opinion of the Court, is, "Whether he ſhall be a Bankrupt, *from* the "31ſt *of March*, when he was *firſt arreſted*; or from the "6th *of May*, when he was *ſurrendered* and committed to the "Marſhal; (in whoſe Cuſtody he lay from the 6th of *May* "till the 15th of *July*.")

As to the 2d Point—This was NOT A WILFUL Eſcape in the Priſoner: But he was *carried* out of the County by the Sheriff. And ſurely *this Act of a third Perſon* ſhall not make a Man a Bankrupt Nor indeed can a *permiſſive* Eſcape ſuffered by the Sheriff, or any *Act of the Sheriff*, make a Man a Bankrupt; who is, in many reſpects, conſidered as a *Criminal.*

As to the 1ſt Point—When a Perſon is *once admitted to Bail*, his lying in Priſon *ſubſequent* thereto, *viz.* the *firſt Day of his* DOING SO *after being ſurrendered*, ſhall be the Time to which his Bankruptcy *ſhall relate*: And *not* the Time of the firſt *Arreſt*, upon which He put in Bail.

The Caſe of *Duncomb* v. *Walter* in 1 *Ventr.* 370. is ill reported there. So, in 3 *Lev.* 57. it is ill reported. It is alſo reported in Sir *Tho. Raymond* 479. and in *Skinner*, twice; *viz. fo.* 22 & 87, 88. In which laſt, it appears to be ſolemnly ſettled, "that the Relation to make a Man a Bank-"rupt ought to be upon an *actual* lying in Priſon, and *not* "upon putting in *Bail* only."§

§ N. B. None of theſe Reports of this Caſe are well drawn up, except Sir Thomas Raymond's. And that is only an Argument, with an Adjournatur.

Came v. *Coleman*, 1 *Salk.* 109. is S. P. *viz.* "that the "Bankruptcy ſhall only be from the Time of *ſuch* firſt Ar-"reſt, *upon which* He lies in Priſon: *Not* where he puts in "ſufficient *Bail.*" And in 17 *G.* 2. *Tribe* v. *Webber*, *C. B. per tot. Cur.* the ſame Point was reſolved unanimouſly. The Caſe of *Smith* v. *Stracy* in 1 *Salk.* 110, 111. is only an Opinion of Ld. Ch. J. *Holt*, at *Niſi prius.*

And

• P. 439. * And it is admitted that the preſent Defendant was *at large*, at a Time intervening between the Arreſt and the Surrender. But even allowing him to have *remained* in Cuſtody of the Sheriff of *Kent*, Yet the Two Months can only run from his firſt LYING in Priſon. There muſt be *ſome* Time (more or leſs) between his being bailed, and his being committed to the Marſhal. Therefore he was only a Bankrupt *from* the 6th of May.

Sir *Richard Lloyd* was beginning to Reply: But the Court thought it unneceſſary.

LORD MANSFIELD obſerved that where poſitive Laws fixed and deſcribed what ſhould be looked upon as Acts of Bankruptcy, they ought to be conſtrued according to their *Intention*, and ſo as to *anſwer the Ends* of public Benefit, which the Legiſlature had in View.

2d Point. In thus conſtruing this Act of Parliament, He held this Caſe not to be SUCH *an Eſcape* as that the Man ſhould be thereby rendered a Bankrupt and a *Criminal*. For the Act clearly intended SUCH *an Eſcape* made by a Priſoner, as ſhews that he means to RUN AWAY, *and thereby defeat his Creditors*. But this is *not* SUCH an Eſcape: And certainly, a Man ſhall not be made a *Criminal*, where he had not the leaſt Criminal Intention to diſobey any Law whatſoever. There is *no Eſcape at all*, in the *Senſe* of this Act of Parliament: He *remained* SUBSTANTIALLY *in Cuſtody*, notwithſtanding his being *thus carried* into another County.

1ſt Point. Where *Bail* is *really* put in, the Bankruptcy *only relates* to the Time of the Surrender. The *moſt ſubſtantial* Trader is liable to be *arreſted*; And the MERE *being* ARRESTED is *no* Preſumption of Inſolvency; The Preſumption from his LYING *in Priſon* two Months, WITHOUT *being able to get* Bail, is a *very ſtrong* One. But THIS *Sort* of Bailing is a *mere* FORM, to turn the Defendant over from One Cuſtody to another: The Bail *never juſtify*.

And upon Caſes of ſuperſeding Actions by reaſon of the Plaintiff's not proceeding upon them within two Terms, being *merely turned over* from one Cuſtody *to another*, is always conſidered as a *Continuance* of the *ſame* Impriſonment. And ſo I think it is, in the preſent Caſe, upon the *preſent Circumſtances*; Notwithſtanding what I have declared as my Opinion, upon the *general* Principle, and upon a *fair* and *ſubſtantial* Bailing. Therefore in the *preſent* Caſe, I think, the Bankruptcy *has* a Relation to the *firſt Arreſt*.

2d Point. Mr. Juſt. DENISON concurred, clearly, in both Points. Can it ever be called an *Eſcape* within the *Meaning* of this Act;

*Act; when the Man *by Permiſſion* of the Sheriff *paſſes through* another County, in being carried to a Judge or to the Court? Can this be eſteemed a *criminal Act* of the Man himſelf? Moſt certainly not. * P. 440.

Nor can this *formal Bail* put in *without Juſtification*, and ONLY in ORDER *to be ſurrendered*, (which is a *mere Matter of Form*,) be conſidered as being OUT *of Cuſtody*, within the *Intent and Meaning* of this Act. No: It is a *Continuation of the ſame* Impriſonment; and has Relation to the *firſt* Arreſt and Impriſonment. 1ſt Point.

Mr. Juſtice FOSTER was clear on both Points; and expreſſed Himſelf to the ſame Effect, as Lord MANSFIELD and Mr. Juſtice DENISON had done.

Mr. Juſt. WILMOT alſo moſt clearly concurred. And He laid it down, "That theſe *Bankruptcy Acts* were to be *conſtrued according to their real Intention.*"

1ſt Point. The *general Principle* of the Caſes cited is right: But the *Reaſon* of them is ſtrongly *againſt* the preſent One, as it ſtands circumſtanced. Here is *not a ſingle Moment*, in which the Man is *out of Cuſtody*: It is a mere Form of *changing his Priſon.*

And the very § Act itſelf *diſtinguiſhes* between *Common* Bail (or no Bail at all,) and *ſufficient* Bail. Now *this* Bail, in the preſent Caſe is, in Effect, NO *Bail* at all. § The Words of it are, "or procure his Enlargement by putting in common or hired Bail." V. § 2.

2d Point. The Acts which render a Bankrupt a *Criminal*, muſt mean an Eſcape AGAINST *the Conſent* of the Sheriff; a *running away*, and *breaking* his Priſon: Certainly *not ſuch* as this was, UNDER *the Conſent* of the Sheriff.

Cur. ORDERED the *Poſtea* to be indorſed, "That *Green* "became a Bankrupt on the 31*ſt of March.*"

Waring *verſus* Griffiths, et al'.

THIS was a Caſe reſerved upon a Trial at *Niſi prius*. Friday, 27th January, 1758.

The Plaintiff's Action was founded upon a preſcriptive Right of Burial of any Perſon dying in his Houſe at *Oſweſtree*, in the Chancel of the Church of *Oſweſtree*: In the Exerciſe of which the Defendants had diſturbed him. And they themſelves acknowledged that they had diſturbed him in it.

The

• P. 441. • The Caſe ſtated was, in ſhort, this: That the Plaintiff was ſeiſed of a Meſſuage &c, in *Oſweſtree* &c, and had ſuch a preſcriptive Right of Burial belonging to it; And that the Defendants *did diſturb* him in burying &c, and *were Wrong-Doers:* But (it was alſo ſtated) that 2s. WAS DUE *to the Pariſh of Oſweſtree*, for *every Perſon* buried in the Chancel of that Church.

Mr. *Aſton*, on Behalf of the Plaintiff, argued that here were two Croſs Preſcriptions; and that the *two* Preſcriptions were *diſtinct* and *collateral:* One, for the Plaintiff to bury &c; the other for the Pariſh to receive a Payment of 2s. &c, for it: And therefore it was NOT *neceſſary to alledge* the latter, in the Declaration, it being only a *collateral* Recompence. And he cited *Cro. Eliz.* 546 & 563. *Lovelace* v. *Reynolds*, A Preſcription for Common; And found that he had Common, *paying* for it &c. So that that was *part* of the Preſcription; A *Condition precedent:* It was *paying for it*, every Year, a Penny to the Plaintiff. But it was holden to be otherwiſe, where there are *Two* Preſcriptions; One, for the Commoner; the other, for the Lord: as in the Caſe in *Cro. Eliz.* 405. *Gray* v. *Fletcher*, Where the Preſcription was found; And "that he and all thoſe &c, "*had* USED to pay for it, every Year a Hen and five Eggs." 5 *Co.* 78. S. C. *Gray's* Caſe—And there, the Terre-tenant was adjudged to have a Remedy for the Recompence. And therefore this was holden to be *only Collateral*, and as *two* Preſcriptions; and therefore need not be alledged, the Preſcription being perfect without it. So here, it need not be alledged: But they may have their *Collateral Remedy*; as, in the *Eccleſiaſtical* Court, they may have. In proof whereof, he cited 1 *Ventr.* 374. *Anonymous*. Where it is ſaid "That "the Remedy for a Duty of this kind is in the Eccleſiaſtical "Court."

And this Fee is not to be paid *till after* the Burial: And therefore the Non-payment of it cannot offend the Wrong-Doer, who is a *Stranger*. So in an Action againſt a *Stranger*, for diſturbing his Seat, or Sepulture in a Church, it is *not* neceſſary to ſhew any *Title in the Plaintiff*. 3 *Lev.* 73. *Aſh'y* v. *Freckleton*: Though in ſuch an Action againſt the *Ordinary* himſelf, it is neceſſary to ſhew ſome Cauſe; as building, repairing, &c.

Kenrick v. *Taylor*, *Paſch.* 25. *G.* 2. *B. R.* It was ſolemnly determined "That in the Caſe of a Stranger and Wrong-"Doer, it was *not* neceſſary to alledge more than his own "Right and Diſturbance."

He mentioned the two following Caſes, *viz.* 2 *Lutw.* 1517. *Bennington* v. *Taylor*; and 3 *Lev.* 90. *Chaſin* v. *Betſworth*,

* *worth*, Which (as he ſaid) are like this Caſe. They were Diſturbances, by Strangers, in erecting Stalls in a Market-Place: And no Title is ſhewn. So, in Caſe of a free Fiſhery. * P. 442.

And the Finding is quite immaterial. For this collateral Claim is no Part of the Plaintiff's preſcriptive Right. *Palmer* 82. * the Caſe of the Corporation of *Maidenhead*, in the Claim of a Market *&c.* *Mayor of Northampton* v. *Ward. Mich.* 19 *G.* 2. *B. R.* * 4th Point.

Mr. *Hall contra* for the Defendant argued that it was PART *of the Preſcription*; and that it *ought to have been alledged*, even *againſt a* WRONG-*Doer*, "that this 2*s.* was "payable to the Pariſh, for every Perſon ſo buried." This is a Preſcription upon a *Condition precedent*. It is an *entire* Preſcription: The Payment of the 2*s.* is *Parcel* of the Preſcription; and it ought to have been ſo laid and alledged. Preſcriptions are againſt Common Right; and ought to be proved, as laid: And the Plaintiff muſt prove it as laid; even *againſt a Wrong*-Doer. And if the Evidence fall ſhort of the Preſcription pleaded, it will be againſt the Perſon who pleaded it. In proof of which Poſition, He cited theſe Caſes—*Carthew* 241. *Rex* v. *the Inhabitants of Hermitage et al.* The Preſcription was not proved as laid, becauſe there was an Exception. *Palm.* 326. *Countee de Devon* v. *Eyre.* Which was a Preſcription *pro Ovibus generally*; (inſtead of *Ovibus* ſuis:) The Proof failed. *Hobart* 209. *Michell* v. *Mortimer.* The Preſcription failed; becauſe it was laid too large. *Cro. Eliz.* 415. *Boraſton* v. *Hay:* A Cuſtom pleaded generally; but found with an Exception: It is againſt the Pleader. *Carthew* 117. *Murgatroid* v. *Law.* The Caſe of *Potwater* mentioned by *Popham* in *Gray*'s Caſe, 5 *Co.* 78. *b.* and *Cro. Eliz.* 405. laid *generally*; found "*paying* 6*d.* by the Year" was ill laid. *Lovelace* v. *Reynolds*, *Cro. Eliz.* 546, 563, allows *Gray*'s Caſe, and the Caſe of *Potwater*. 2 *Ro. Abr.* 720. *Title Trial, pl.* 30, in Prohibition——The Plaintiff declared upon a Preſcription about Lambs: And the Jury found farther, *&c:* It was holden that the Plaintiff *ought to have rehearſed the* WHOLE of it; and that for not doing ſo, he had failed in his Preſcription.

Now here, the Payment of 2*s. is* PART *of the Preſcription*, and muſt be *as ancient* as the Right; which is "to bury in "the Chancel, any Perſon dying in his Houſe * *paying* 2*s.* "for each Perſon." Which is a Condition PRECEDENT, and therefore ought to have been alledged. *Forreſter*, 166. Sir *John Robinſon* v. *Comyns*, "There are no technical Words "to diſtinguiſh Conditions precedent, and Conditions ſubſequent." *Acherley*. v. *Vernon—per* Ld. Ch. J. *Willes* [See this Caſe in *Lucas* 518.] *Watſon* 709. * Note. He does not here ſtate the preſent Preſcription truly, according to the Caſe ſtated V. ante 441.

The

* P. 445. * Possession *alone* is certainly sufficient. Therefore He was clear, upon both Points.

Per Cur. unanimously
Let the Postea be delivered to the Plaintiff.

Rex *verſ.* Loxdale and Four Others.

Mr. *Morton* had ſometime ago, (*viz.* on *Monday* 17th *November* 1755.) moved to quaſh an Order of two Juſtices appointing Five *Overſeers* for the Pariſh of St. *Chad*, in *Shrewſbury*.

His Objection was that the Juſtices have no Power to *exceed* the Number of Four. Which Objection was founded upon the Words of 43 *Eliz. c.* 2. §. 1. "That "the Church-Wardens of every Pariſh; and Four, *three*, "or *two* ſubſtantial Houſeholders there, as ſhall be thought "meet, having reſpect to the Proportion and Greatneſs of "the ſame Pariſh and Pariſhes, to be nominated yearly in "*Eaſter* Week, or within one Month after *Eaſter*, under the "Hand and Seal of two or more Juſtices of the Peace in the "ſame County, (whereof one to be of the *Quorum*) dwelling "in or near the ſame Pariſh or Diviſion where the ſame "Pariſh doth lie, ſhall be called Overſeers of the Poor of "the ſame Pariſh: And they, *or the greater Part of them*, "*&c.*" And he mentioned a former Caſe of *Rex* v. *Harman*, upon the very ſame Point, which depended in this Court from *P.* 12 *G.* 2. to *M.* 15 *G.* 2. and at laſt was never determined; and alſo *Rex* v. *Beſland*, *Hil.* 19 *G.* 2. *B. R.* which was the *Reverſe* of an Excess of their Juriſdiction, where the Order, (being to appoint One Overſeer,) was confirmed.

A Rule was thereupon made, "to ſhew Cauſe." And after the Point had been ſeveral Times argued in Ld. Ch. J. *Ryder's* Time, it came on to be argued once more, on the 27th of *January* 1757, before Lord *Mansfield*, he having never heard the former Arguments. When the ſame Things which had been ſo often ſaid, were again repeated.

On the Side of the Extenſion of the Number of Overſeers, *Uſage* was alledged and greatly relied upon.

Note—The Court, miſled by Aſſertions "that there had "been a Uſage to appoint more Overſeers than four;" for fear of Inconvenience, had avoided determining the Queſtion in the Caſe of the *King* v. *Harman*, after it had depended ſix Years, in hopes that the Legiſlature would make ſome Proviſion for what was paſt, as well

well as for the Future. And upon the ſame Apprehenſi-* P. 446.
on, the Court had hitherto poſtponed the Determination of this.

Lord Mansfield ſaid He had ſeen full Notes of the former Arguments of the preſent Caſe; and alſo of the Caſe of *Rex* v. *Harman*. He obſerved particularly what was ſaid as to the Uſage in large Pariſhes. And He therefore had directed Inquiry to be made in many large Pariſhes, as to the Fact "Whether there had been ſuch Uſage, or not;" And he ordered the Return which had been made to Him upon ſuch Inquiry, by the Agents on both Sides, to be read. From which, it appeared thus——In St. *James's Clerkenwell*, 4. In St. *Bridget's*, 3. In St. *Dunſtan's*, 2. In St. *Clement's Danes*, 4. In St. *Paul's Covent-Garden*, 2. In St. *George's Hanover Square*, 4. In St. *James's Weſtminſter*, 4. In St. *Margaret's Weſtminſter*, 2. In St. *Andrew's Holborn*, 8: (but that Pariſh contains 3 ſeparate Diviſions.) In St. *Giles's in the Fields*, 8; (though *now* only 4 are appointed by the Juſtices, and act as Aſſiſtants, unleſs 8 voluntarily ſerve: but there were never leſs than 8 *before* the Caſe of *Rex* v. *Harman*.) In St. *Martin's in the Fields*, 5. (ſince the Act of Parliament lately made, which impowers them to appoint 9, if in the Diſcretion of the Juſtices it ſhould be thought proper.) In *Shrewſbury*, (which contains 5 Pariſhes) In St. *Alſemonds*, 3. In *Holy-Croſs* and St. *Giles's*, 4. In St. *Mary's*, 4. St. *Julian's*, 4. St. *Chad's*, 5, for *one* Year only; And never exceeding 4. *but once*, *viz.* this *preſent* Year.

After reading the Report, Lord *Mansfield* proceeded,—— The Usage is, as it were, out of the Caſe; or rather, it ſuppoſes "that they can *not* legally exceed 4."

Therefore, conſequently but *little* Inconvenience can ariſe from determining the Conſtruction of the Statute, *according* to its natural Import.

As to *legal* Conſtructions—The Caſe of *Rex* v. *Harman* was never determined *as* to the * Order for the Appointment *of Overſeers*.

* There was *another* Order, adjudging *Harman* "to have neglected the Execution of his Office;" which *was* quaſhed in *Mich.* 13 G. 2.

In the Caſe of *Rex* v. *Beſland*, where *only One* Overſeer was appointed, *no* Opinion was given *judicially*, upon the Point of Law; nor was the Appointment † quaſhed. So that the preſent Caſe is a new Original Caſe: And it muſt be determined upon the 43 *Eliz. c.* 2: which is the Foundation of the Syſtem of Law concerning the Poor.

† It was confirmed as *not neceſſarily* appearing to be a bad Order: For it *might* be, "that others were appointed by *other* Orders."

* P. 447. * There is a known Diſtinction between Circumſtances which are of the *Eſſence* of a Thing required to be done by an Act of Parliament, and Clauſes *merely directory*. The *preciſe Time*, in many Caſes, is NOT of the *Eſſence*.

In the Caſe of *Rex* v. *Sparrow*, 2 *Strange* 1123, the Juſtices had been guilty of a *Neglect*, in not appointing Overſeers within *due Time*: And this Court iſſued a *Mandamus* to compel them to do it afterwards, for the *Sake of the Poor*. The Poor could not have had *a* SPECIFIC *Remedy*, in that Caſe; *unleſs* the Juſtices might do it *after* the preciſe Time, in Obedience to the *Mandamus*.

So, as to the Juſtices "*in or near* the Pariſh or Diviſion" —It is *only Directory*.

Juſtices of Peace have *no other* Power to appoint Overſeers but under the Special Authority given them by Act of Parliament. Therefore the Special Authority muſt be ſtrictly purſued, and can *not* be *exceeded* by them. The Queſtion here is upon the Meaning and Intention of the Legiſlature, in this Power given the Juſtices to appoint Overſeers.

Where there are different Statutes *in pari materia*, though made at different Times, or even expired, and not referring to each other they ſhall be taken and *conſtrued together*, as one Syſtem, and as explanatory of each other. So, in the Laws concerning Church Leaſes; and thoſe concerning Bankrupts. And ſo alſo I conſider All the Statutes providing for the Poor, as *one Syſtem* relative to that Subject. Now 39 *Eliz. c.* 3, is the firſt of theſe, and when firſt mentioned by my Brother *Foſter*, ſtruck Me ſtrongly, with regard to the Determination of the preſent Queſtion. That Act ſays, "That the Church-Wardens and FOUR ſubſtantial Houſeholders, *&c*," (*without any Latitude* whatſoever, for a greater Number.) And *more* than four could *not* have been appointed under it: For the Number the *Legiſlature* had named, could *not* be altered.

That Act of Parliament of the 39 *Eliz.* was *continued* by the very Act of 43. *Eliz. c.* 2. §. 1, till the following *Eaſter*, when that of 43 *Eliz. c.* 2, was to take Place: So that the Legiſlature had it before them, and even under *particular* Conſideration. And that Act of 39 *Eliz.* is expreſsly fixed to *four*. Pariſhes were not then, ſo populous as they are now. And this Act of 43 *Eliz. c.* 2. gives Power to *leſſen* the Number to Three or Two according to the Size of the Pariſh; But they had no Notion of *extending* it to a *greater* Number. And there is *ſome* Weight in the Circumſtance of the Numbers *deſcending* from 4 downwards, and *not aſcending* upwards.

As

* As to the Argument which was drawn from 13, 14 *C.* 2. *c.* 12. §. 21. I think that Statute ought to be taken into Conſideration in conſtruing this of 43 *Eliz. c.* 2: But I do *not* ſee that this will help the Caſe. For it is begging the Queſtion, to ſuppoſe "that the Juſtices MAY appoint *more* than 4 Overſeers of the Poor, in Townſhips and Villages in thoſe large Pariſhes." It is expreſsly directed by that Statute of 13, 14 *C.* 2. *c.* 12. §. 21. that ſuch Choice and Appointment ſhall be, (And the Conſtruction of it muſt be guided according to its *own* Reference,) "ACCORDING to the Rules and Directions mentioned in the Statute of 43 *Eliz.*" And neither any judicial Determination, nor Uſage, ſupport this Conceit "that "they *can* appoint *more* than 4 in theſe Townſhips and Villages in the large Pariſhes." * P. 448.

That Act of 13, 14 *C.* 2. was indeed rightly and reaſonably extended to *Wales*. But no Argument can be drawn from *that* Latitude of Conſtruction: As both the Words of it, (which *name Wales*,) and alſo the general Intention of it, (*viz.* the *Care of the Poor*,) well juſtified *ſuch* an Extenſion.

Then the Act of Parliament in 1740, relating to St. *Martin*'s and the Overſeers of that Pariſh, and which extends their Number, ſhews the Conſtruction put *by the Legiſlature* themſelves upon the 43 *Eliz.* on this Head; and excepts this very large Pariſh of St. *Martin* out of it. And yet even this very Act *reſtrains* the Number to *Nine*: Which ſhews that the Juſtices had no Power under the 43 *Eliz.* to appoint *what Number* THEY PLEASED. For it would be a ſtrange Thing, to *limit* the Number, in a *very large* Pariſh; and leave it *at large*, in *ſmaller* Ones.

There are two other Acts of Parliament, which have not been mentioned; and both of them paſſed after the Caſe of *Rex* v. *Harman*, and after the Caſe of St *Clement Danes*; *viz.* 17 *G.* 2. *c* 3 and 17 *G.* 2. *c.* 38, both relating to Overſeers: And yet no Extenſion of Number, nor any Variation therein.

The PRECISE NUMBER is *not* an *immaterial* Thing either to the Officers of the Pariſh, or to the Perſons for whom they are Truſtees. Upon themſelves, 'tis a Burden: Which, by this Practice, would come round the ſooner. And in reſpect to the Pariſh for whom they are Truſtees, a great Number may not do Buſineſs better than a ſmaller; and it would be attended with more Expence.

Alſo with regard to the *Church-Wardens* who are joined in Authority with them—They are *only* 2, or (by Cuſtom) 4 Church-Wardens in each Pariſh. Therefore a greater

* P. 449. Number of *Overſeers* being appointed, neceſſarily alters the Balance of the *Majority* amongſt them, and makes an eſſential Difference in the Proportion between one and the other. And there is no Number to *ſtop* at, if the Juſtices *exceed* four: They may go on, without *any* Boundary, unleſs the ſpecified Number of Four be the Limit.

Therefore I think this Appointment of *more* than 4, is NOT *warranted* by the 43 *Eliz.* upon the *true* Conſtruction of that Statute.

Mr. Juſtice DENISON concurred in Opinion, "that this "Appointment ought to be quaſhed:" And He did not think that this Court *ever had had* any Doubt about the *legal* Determination of this Queſtion.

He then ſtated and expatiated upon the Caſe of *Rex* v. *Harman*; and ſaid the Reaſon why the Court did not quaſh that Appointment was *merely* for the *Sake* of the *Poor*; and not from any Doubt of the *Law*.

Beſland's Caſe was quite a different Caſe from that of appointing a *greater* Number than four. The Point of the Validity of an Order appointing more than Four, is a *new* Caſe: but *not* a *difficult* One at all.

This Act of 43 *Eliz.* is, as one may call it, the *Magna Charta* of the Poor. And it can never be called *directory* as to the *Number of the Overſeers* appointed by it.

By 1 *Inſt.* 13. *b.* it appears that there were *only two Eſcheators*, in *England*, in ancient Time: Though more were made indeed by Act of Parliament, [14 *E.* 3. *c.* 8.] So there can be but *One Chief Juſtice*, or *Chief* Prothonotary, *Jenkins* 142. *Caſe* 93. So, in the Conſtitution of the Court of *Wards*; where 32 *H.* 8. *c.* 46. enacts "that "there ſhall be *two* Auditors of the Court of *Wards*," the King can not make *Four*. So is 11 *Co.* 4. *a. Auditor Curle*'s Caſe.

Certainly, the Legiſlative had the Number which ſtood fixed by 39 *Eliz.* in their *View* and under their *Conſideration*, when they made the 43 *Eliz.* And Can it be imagined that the Juſtices have a Juriſdiction to appoint *more*? Clearly, they have *not*.

In the Caſe of *Rex* v. *Sparrow*, (mentioned in 2 *Strange* 1123.) The Court took great Care in their Determination. And 13, 14 *C.* 2. was there conſidered by Ld. Ch. Juſt. *Lee*, as tied up to the Rules and Directions of 43 *Eliz.* And that *Mandamus* was iſſued for the *Sake* of the *Poor*: And the Court equitably and rightly held "That "when the Juſtices had elapſed the Time for appointing "Overſeers,

* Overſeers, the Court might oblige them to do it afterwards, *as* to the *Time*; THAT being diſcretionary." * P. 450.

But No-body ever thought it diſcretionary *as* to the NUMBER; And there is no Reaſon in the Earth, for us to break the Boundary, which is fixed. Therefore he was clear, to quaſh the preſent Order for the Appointment of *five*.

Mr. Juſt. FOSTER declared the very ſame Thing; and that he never had any Doubt in Point of *Law*: His only Doubt was in Point of *Diſcretion*; as he *then* ſuppoſed the *Uſage* to be otherwiſe than as it *now* appeared to be.

When the Statute of 43 *Eliz.* was made, there were very few large Pariſhes in Towns and Cities: Therefore at *that Time*, the Parliament thought four Overſeers ſufficient. Under 39 *Eliz.* I take it, the Juſtices *could not have gone* BELOW *Four*. For, It being a *Special Power* given by Statute, muſt be *ſtrictly purſued*. And therefore, in the 43 *Eliz.* the Legiſlature, though they took the Act of the 39th for their Plan, and followed it in almoſt every Inſtance; yet, ſeeing the Inconvenience in ſmall Pariſhes; departed from it with regard to the NUMBER of Overſeers: Which they *reduced*, at the Diſcretion of the Juſtices; but did *not increaſe*, in any Event; probably becauſe they thought *Four* Overſeers, *with* the Church-wardens, ſufficient for the largeſt Pariſh (as they certainly are) though too many for the ſmall ones.

If it be *now* become inconvenient, the Application muſt be to *Parliament*. However, he declared that he did not think that Buſineſs *is* beſt done by a Multitude of Hands; And in Fact, where the Number that are to do it is large, they always delegate the actual Tranſaction of it to a *Few*.

It is NOT *true*, (what ſome People imagine) "That the "*Common* Law of *England* made NO *Proviſion* for the *Poor*:" The Mirror ſhews the *contrary*. How, indeed, it was *done*, does not appear.

As to the Caſe of *Rex* v. *Sparrow*—43 *Eliz.* fixes a *Time* to appoint Overſeers, with a Penalty: But did not mean that the *Poor ſhould loſe* the Equity and Benefit of the Act, if the Juſtices did not appoint *within* that Time.

No Pariſh ever applied for a *Mandamus* commanding the Juſtices to appoint *more* than Four. The general Senſe of Mankind was againſt it. This is an *Authority founded* upon a *poſitive* Law; and *therefore muſt* be purſued.

Mr.

* P. 451. * Mr. Juſt. WILMOT declared (as his Brethren Mr. Juſt. DENISON and Mr. Juſt. FOSTER had done) that he never had had the leaſt Doubt, but upon the Apprehenſion of an *Uſage* of the large Pariſhes, for many Years back, *to appoint* MORE than Four. But this Apprehenſion is now vaniſhed: And therefore the *Uſage* (as it *now* comes out) confirms the *true* Conſtruction of the Act.

The Inſtances of greater Numbers appear to be *only Three*: And one of them (*St. Andrew's Holbourn*) is conſidered as 3 Vills, under 13, 14 *C.* 2. And *St. Martin's* (another of them) is under a new Act of Parliament made on Purpoſe. I think this Order *cannot* be ſupported.

There *were* Proviſions for the Poor, as my Brother FOSTER has obſerved, at *Common* Law: Though it does not fully appear *what* they were. The firſt *regular* Proviſion however, is by 39 *Eliz.* By this Statute, and by 43 *Eliz.* the Legiſlature add *Four* OVERSEERS to the *former parochial Adminiſtration*. And no one can doubt that the *Number* is *eſſential*; and *cannot*, by the Rule of Law be *exceeded*. For Powers given by a poſitive Law, or even by Deed, to CERTAIN *Numbers* of Perſons can never be exceeded, in the Article of Number. On the other Hand, If it had reſted ſingly upon 39 *Eliz.* the Number 4 could not have been *leſſened*. But then indeed the 43 *Eliz.* relaxes this preciſe Number of *Four*, as to *ſmall* Pariſhes: but ſtill *continues it*, as to all *greater*. And where the Makers of the Act *intend* an *indefinite* Number, they EXPRESSLY *ſay ſo*. For the 19th Section relating to the Iſland of *Foulneſs* converts the whole Diſtrict into one Pariſh, for this Purpoſe; and *directs* an *indefinite* Number of Overſeers for *that* Place. Which Clauſe *alone* would ſatisfy me, as to the *Senſe* of the *Legiſlature*. And they might as eaſily have ſaid "*ſo many* as ſhould ſeem "neceſſary," as preciſely fix it to *Four*; if they had meant it ſo.

And it is (as has been obſerved) an Office which is burdenſome upon the Perſons appointed: And Buſineſs is *not* better done by great Numbers of Men, than by a few. And the *Pariſh* have as great Security from Four, as from more. Upon the whole, he entirely concurred, "That the Order "could not be ſupported."

Mr. *Norton* moved that the Order might not be immediately quaſhed; becauſe the Overſeers had laid out 500*l.* or 600*l.* *under* it: And therefore he propoſed that the other Side ſhould conſent to have one of the Overſeers *left out* of the Order.

The

* The COURT thought it might be reaſonable: And for this Reaſon ONLY, did not directly and immediately *pronounce* the Rule "To quaſh the Order." * P. 452.

But now, at a Day ſo long ſubſequent, on Mr. *Morton*'s Motion for the Judgment of the Court; and Mr. *Norton*, not urging any thing further againſt it, (and acknowledging that he had ſpoken to his Client,)

LORD MANSFIELD ſaid there muſt be an End of it, ſome Time or other: Therefore let the RULE be made abſolute, to

QUASH the APPOINTMENT.

ORDER QUASHED.

Miller *verſus* Race.

Tueſday, 31ſt Jan. 1758.

IT was an Action of TROVER againſt the Defendant, upon a BANK-NOTE, for the Payment of Twenty-one Pounds Ten Shillings to one *William Finney* or *Bearer*, on Demand.

The Cauſe came on to be tried before Lord *Mansfield*, at the Sittings in *Trinity* Term laſt at *Guildhall*, *London*: And upon the Trial it appeared that *William Finney*, being poſſeſſed of this Bank-Note on the 11th of *December* 1756, ſent it by the General Poſt, under Cover, directed to *Bernard Odenharty* at *Chipping Norton* in *Oxfordſhire*; that on the ſame Night, the *Mail was robbed*, and the Bank-Note in Queſtion (amongſt other Notes) taken and carried away by the Robbers: That this Bank-Note, on the 12th of the ſame *December*, came into the Hands and Poſſeſſion of the Plaintiff, for a *full and valuable Conſideration*, and *in the* USUAL *Courſe and Way of his Buſineſs*, and *without any Notice or Knowledge* of this Bank-Note being taken out of the Mail.

It was admitted and agreed, that in the common and known Courſe of Trade, Bank-Notes are paid by and received of the Holder or Poſſeſſor of them, *as Caſh*: And that in the uſual way of negociating Bank-Notes, they paſs from one Perſon to another as Caſh, by *Delivery only*, and *without* any further Inquiry or Evidence of *Title*, than what ariſes from the *Poſſeſſion*. It appeared that Mr. *Finney* having Notice of this Robbery, on the 13th of *December*, applied to the Bank of *England*, "*to ſtop the Payment* of this "Note:" Which was ordered accordingly, upon Mr. *Finney*'s entering into proper Security "to indemnify the "Bank."

Some

* P. 453. * Some little Time after this, the Plaintiff applied to the Bank for the Payment of this Note; and, for *that* Purpoſe, delivered the Note to the Defendant, who is a Clerk in the Bank: But the Defendant refuſed either to pay the Note, or to *redeliver* it to the Plaintiff. Upon which, this Action was brought againſt the Defendant.

The Jury found a Verdict for the Plaintiff, and the Sum of 21*l.* 10*s.* Damages: ſubject nevertheleſs to the Opinion of this Court upon this Queſtion—"Whether, under the "Circumſtances of this Caſe, the Plaintiff had a *ſufficient* "*Property* in this Bank-Note to intitle him to recover in the "*preſent Action?*"

Mr. *Williams* was beginning on Behalf of the Plaintiff.—

But LORD MANSFIELD ſaid "That as the Objection came "from the Side of the Defendant, it was rather more "proper for the Defendant's Counſel to ſtate and urge "their Objection."

Sir *Richard Lloyd*, for the Defendant.

The preſent Action is brought, *not* for the *Money* due upon the Note; but for the NOTE *itſelf*, the *Paper*, the *Evidence* of the Debt. So that the *Right to the* MONEY is *not* the preſent Queſtion; The Note is only an *Evidence* of the Money's being due *to him* AS BEARER.

The Note muſt either come to the Plaintiff *by Aſſignment*; or muſt be conſidered as if the Bank gave a *friſh, ſeparate, and diſtinct Note to each* Bearer. Now the Plaintiff can have no Right by the *Aſſignment of a* ROBBER. And the Bank cannot be conſidered as giving a *new* Note to each Bearer: Though each Bearer may be conſidered as having obtained from the Bank a *new* PROMISE.

I do not ſay whether the Bank *can*, or *cannot ſtop Payment: That* is *another* Queſtion. But the *Note* is only an *Inſtrument* of Recovery.

Now this Note, or theſe Goods (as I may call it) was the *Property* of *Finney*, who paid in the Money: *He* is the real Owner. It is like a Medal, which might intitle a Man in Payment of Money, or to any other Advantage. And it is by Mr. *Finney*'s Authority and Requeſt, that Mr. *Race* detained it.

It may be objected, "that this Note is to be conſidered "*as Caſh* in the *uſual Courſe of Trade.*" But ſtill, the Courſe

* Courſe of Trade is not at all affected by the *preſent* Queſtion, about the Right to the *Note*. A *different Species of Action* muſt be brought for the *Note*, from what muſt be brought againſt the Bank for the *Money*. And this Man has elected to bring Trover *for the* NOTE itſelf, *as Owner of the* NOTE; and not to bring his Action againſt the Bank, for the *Money*. In which Action of *Trover*, Property can not be proved in the Plaintiff: For a *Special* Proprietor can have no Right againſt the TRUE *Owner*. * P. 454.

The Caſes that may affect the preſent, are 1 *Salk*. 126. *M.* 10 *W.* 3. *Anonymous*, *coram Holt*, Ch. J. at *Niſi prius* at *Guildhall*. There Ld. Ch. J. *Holt* held "that the right Owner "of a Bank-Bill, who loſt it, might have Trover againſt a "Stranger who found it: But not againſt the Perſon to "whom the Finder transferred it for a valuable conſidera-"tion, by reaſon of the *Courſe of Trade* which *creates a* "*Property* in the Aſſignee or Bearer." 1 Ld. *Raym*. 738.

* S. C. In which Caſe, the Note was *paid away*, in the Courſe of Trade: But *this* remains in the Man's Hands, and is not † come into the Courſe of Trade. *H.* 12 *W.* 3. *B. R.* 1 *Salk*, 283, 284. *Ford* v. *Hopkins per Holt* Ch. J. at *Niſi prius* at *Guildhall*. "If Bank-Notes, Exchequer-Notes, "or Million-Lottery Tickets, or the like, are ſtolen or loſt, "the Owner has ſuch an Intereſt or Property in them, as to "bring an Action, *into* WHATSOEVER *Hands* they are come. "Money or Caſh is not to be diſtinguiſhed: But theſe Notes "or Bills are diſtinguiſhable, and *can* NOT *be reckoned as* "CASH; And they have diſtinct Marks and Numbers on "them." Therefore the true Owner may ſeize theſe Notes wherever he finds them, if not paſſed away, in the Courſe of Trade.

* N. B. In this Caſe the Tranſferree went to the Bank; and got a new Bill, in his own Name. However, the Caſe turned upon his having the Note for a valuable Conſideration.

† The Fact ſeems to be quite otherwiſe.

1 *Strange* 505. *H.* 8 *G.* 1. In *Middleſex*, *coram Pratt* Ch. J. *Armory* v. *Delamirie*—A Chimney Sweeper's Boy found a Jewel. It was ruled "that the *Finder* has ſuch a Property "as will enable him to keep it *againſt* ALL *but* the *rightful* "Owner, and, conſequently, may maintain Trover."

This Note is juſt like *any other* Piece of Property, UNTIL *paſſed away in the Courſe of Trade*. And *here* the Defendant *acted as* AGENT to the TRUE *Owner*.

Mr. *Williams contra* for the Plaintiff.

The HOLDER of this Bank-Note, upon a *valuable* Conſideration, has a Right to it, even *againſt* the *true* Owner.

1ſt. The Circulation of theſe Notes veſts a *Property* in the *Holder*, who comes to the Poſſeſſion of it, upon a *valuable* Conſideration.

2dly. This

* P. 455. * 2dly. This is of vaſt *Conſequence to Trade and Commerce:* And they would be greatly incommoded, if it were otherwiſe.

3dly. This falls *within the Reaſon* of a Sale in *Market-Overt*; and ought to be determined upon the *ſame Principle*.

Firſt—He put ſeveral Caſes, where the Uſage, Courſe, and Convenience of Trade, *made* the Law: And ſometimes, even *againſt an Act of Parliament*. 3 *Keb.* 444. *Stanley* v. *Ayles*. *Per Hale* C. J. at *Guildhall*. 2 *Strange* 1000. *Lumley* v. *Palmer:* Where a Parol-Acceptance of a Bill of Exchange was holden ſufficient againſt the Acceptor. 1 *Salk.* 23.

Secondly.—This Paper Credit has been always, and with great Reaſon, favoured and encouraged. 2 *Strange* 946. *Jenys* v. *Fowler et al'*.

The *Uſage* of theſe Notes is, "that they *paſs* by *Delivery* "*only*; and are *conſidered as current Caſh*; and the POSSES-"SION always *carries* with it the Property." 1 *Salk.* 126. *pl.* 5. is in Point.

A particular Miſchief is rather to be permitted, than a general Inconvenience incurred. And Mr. *Finney* who was robbed of this Note, was guilty of *ſome* Laches in not preventing it.

Upon Sir *Richard Lloyd*'s Argument, a Holder of a Note might ſuffer the Loſs of it, for want of Title againſt a true Owner; even if there was a Chaſm in the Transfer of it through one only out of 500 Hands.

Thirdly—This is to be conſidered upon the *ſame Foot* as a *Sale in Market Overt*.

2 *Inſt.* 713. "A Sale in *Market Overt binds* thoſe that had "Right."

But it is objected by Sir *Richard*, "that there is a ſub-"ſtantial *Difference* between a Right to the *Note*, and a "Right to the *Mone*." But I ſay the Right to the Money will *attract* to it a Right to the Paper. Our Right is not by *Aſſignment*; but by *Law*, by the Uſage and Cuſtom of Trade. I do not contend that the *Robber*, or even the *Finder* of a Note, has a *Right to the Note:* But AFTER *Circulation*, the Holder upon a valuable Conſideration *has* a Right.

We *have a Property* in this Note: And have recovered the Value againſt the WITH-HOLDER of it. It is not material, *what* Action We could have brought againſt the *Bank*.

Then

* Then He anſwered Sir *Richard Lloyd*'s Caſes; And agreed that the true Owner might purſue his Property, where it came into the Hands of another, WITHOUT *a valuable Conſideration*, or NOT IN *the Courſe of Trade*: Which is all that Ld. Ch. J *Holt* ſaid in 1 *Salk.* 284. * P. 456.

As to 1 *Strange* 505. He agreed that the Finder has the Property againſt all *but* the rightful Owner; NOT *againſt* HIM.

Sir *Richard Lloyd* in Reply——

I agree that the Holder of the Note has a *Special* Property: But it does not follow that he can maintain *Trover* for it, *againſt the true Owner.*

This is not only *without* but AGAINST *the Conſent* of the Owner.

Suppoſing this Note to be a Sort of *mercantile* Caſh; yet it has an Ear-Mark, by which it may be diſtinguiſhed: Therefore Trover will lie for it. And ſo is the Caſe of *Ford* v. *Hopkins.*

And You may recover a Thing ſtolen from a Merchant, as well as a Thing ſtolen from another Man. And this Note is a mere Piece of Paper: It may be as well ſtopped, as any other Sort of Mercantile Caſh, (as, for Inſtance, a *Policy* which has been ſtolen.) And this has NOT *been paſſed away* in Trade: but remains in the Hands of the true Owner. And therefore it does not ſignify in *what Manner* they are *paſſed away*, when they *are* paſſed away: For this was NOT *paſſed* away. Here, the true Owner, or his *Servant* (which is the ſame Thing,) detains it. And, ſurely, *Robbery* does *not deveſt the Property.*

This is not like Goods ſold in *Market Overt*: Nor does it paſs in the Way of a Market Overt; nor is within the Reaſon of a Market Overt. Suppoſe it was a *Watch* ſtolen: The Owner may ſeize it, (though he finds it in a Market Overt,) *before* it is ſold there. But there is no Market Overt FOR *Bank Notes.*

I deny the Holder's (merely *as* Holder) having a Right to the Note, *againſt the* TRUE *Owner*: And I deny that the *Poſſeſſion* gives a Right to the Note.

Upon this Argument on *Friday* laſt, Ld. *Mansfield* then ſaid that Sir *Richard Lloyd* had argued it ſo ingeniouſly, that (though he had no Doubt about the Matter,) it might be proper to look into the Caſes he had cited, in Order, to give a properer Anſwer to them: And therefore the

Court

* P. 457. * Court deferred giving their Opinion, to this Day. But at the ſame Time, Ld. *Mansfield* ſaid He would not wiſh to have it underſtood in the City, that the Court had any *Doubt* about the Point.

Lord MANSFIELD now delivered the Reſolution of the Court.

After ſtating the Caſe at large, He declared that at the Trial, He had no Sort of Doubt, but that this Action was *well* brought, and *would lie* againſt the Defendant in the preſent Caſe; upon the *general Courſe of Buſineſs*, and from the *Conſequences* to Trade and Commerce: which would be much incommoded by a contrary Determination.

It has been very ingeniouſly argued by Sir *Richard Lloyd*, for the Defendant. But the whole Fallacy of the Argument turns upon comparing Bank-Notes to what they do *not reſemble*, and what they *ought not* to be compared to, *viz.* to Goods, or to Securities, or Documents for Debts.

Now they are *not* Goods, nor Securities, nor Documents for Debts, nor are ſo eſteemed: But are treated as *Money*, as *Caſh*, in the ordinary Courſe and Tranſaction of Buſineſs, by the general Conſent of Mankind; which gives them the Credit and Currency of *Money*, to ALL Intents and Purpoſes. They are as much *Money*, as Guineas themſelves are; or any other Current Coin, that is uſed in common Payments, *as* Money or Caſh.

They paſs *by a Will*, which bequeaths all the Teſtator's Money or Caſh; and are *never* conſidered as *Securities* for Money, but as *Money itſelf*. Upon Ld. *Aileſbury*'s * Will 900l. in Bank-Notes was conſidered as *Caſh*. On *Payment* of them, whenever a Receipt is required, the Receipts are always given *as* for *Money*; NOT as for *Securities* or *Notes*.

* Popham et al. v. Bathurſt et al. in Chancery, 5th November, 1748.

So, on Bankruptcies, they can not be followed as identical and diſtinguiſhable from Money: But are always conſidered as *Money* or *Caſh*.

'Tis pity that Reporters ſometimes catch at quaint Expreſſions that may happen to be dropped at the Bar or Bench; and miſtake their Meaning. It has been quaintly ſaid, "that the *Reaſon why* Money can not be followed is, BECAUSE it has *no Ear-Mark*:" But this is NOT *true*. The *true* Reaſon is, upon Account of the *Currency* of it: It can not be recovered after it has paſſed *in Currency*. So, in Caſe of *Money ſtolen*, the true Owner can not recover it, *after* it has been paid away fairly and honeſtly upon a valuable

and

* and *bonâ fide* Conſideration: But *before* Money has paſſed * P. 458.
in Currency, an Action may be brought for the *Money itſelf*. There was a Caſe in 1 *G.* 1. at the Sittings, *Thomas* v. *Whip*, before Ld. *Macclesfield*: Which was an Action upon *Aſſumpſit*, by an Adminiſtrator againſt the Defendant, for Money had and received to his Uſe. The Defendant was Nurſe to the Inteſtate during his Sickneſs; and, being alone, conveyed away the *Money*. And Ld. *Macclesfield* held that the Action lay. Now this muſt be eſteemed a *Finding*, at leaſt.

Apply this to the Caſe of a *Bank Note*. An Action may lie againſt the *Finder*, 'tis true; (and it is not at all denied;) But NOT *after* it has been PAID AWAY IN CURRENCY. And this Point has been determined, even in the Infancy of Bank Notes: For 1 *Salk.* 126. *M.* 10 *W.* 3. at *Niſi prius*, is in * Point. And Ld. Ch. J. *Holt* there ſays that it is * V. ante, 454.
"by *eaſon of the Courſe of Trade*; which creates a Proper-
"ty in the Aſſignee or Bearer." (And "the Bearer" is a *more proper* Expreſſion than *Aſſignee*.)

Here an Inn-keeper took it, *bona fide*, in his Buſineſs, from a Perſon who made the Appearance of a Gentleman. Here is no Pretence or Suſpicion of COLLUSION *with the Robber*: For this Matter was ſtrictly inquired and examined into at the Trial; and is ſo ſtated in the Caſe, "that he "took it for a *full and valuable Conſideration*, in the *uſual* "*Courſe of Buſineſs*." Indeed if there had been any *Colluſion*, or any Circumſtances of *unfair Dealing*; the Caſe had been much otherwiſe. If it had been a Note for 1000l. it might have been ſuſpicious: But this was a *ſmall* Note, for 21l. 10s. only: and *Money given in Exchange* for it.

Another Caſe cited was a looſe Note ‡ in 1 Ld. *Raym.* 738, ‡ Ex relatione of another Perſon,
ruled by Ld. Ch. J. *Holt* at *Guildhall*, in 1698; which proves nothing for the Defendant's Side of the Queſtion: But it is exactly agreeably to what is laid down by my Ld. Ch. J. *Holt*, in the Caſe I have juſt mentioned. The Action did not lie againſt the Aſſignee of the Bank-Bill; BECAUSE he had it for *valuable* Conſideration.

In that Caſe, he had it from the Perſon who found it: But the Action did not lie againſt him, *becauſe* he took it in the *Courſe of Currency*; And *therefore* it could not be followed into his Hands. It *never* ſhall be followed into the Hands of a Perſon who *bona fide* took it in the *Courſe of Currency*, and in the way *of his Buſineſs*.

The Caſe of *Ford* v. *Hopkins*, was alſo § cited: Which § V. ante 454.
was in *Hil.* 12 *W.* 3. *coram Holt* Ch. J. at *Niſi Prius*, at *Guildhall*; and was an Action of Trover for Million Lottery Tickets. But this muſt be a very *incorrect* Report of that

P. 459. that Caſe: It is *impoſſible* that it can be a true Repreſentation of what Ld. Ch. J. *Holt* ſaid. It repreſents Him as ſpeaking of *Bank-Notes*, Exchequer Notes, and *Million-Lottery Tickets*, as LIKE *to each other*. Now no two Things can be more UNLIKE to each other, than a *Lottery-Ticket*, and a Bank-Note. Lottery Tickets are *identical* and *ſpecific: Specific Actions* lie for them. They may prove extremely unequal in Value: One may be a Prize; another, a Blank. *Land* is not more ſpecific, than *Lottery Tickets* are. It is there ſaid, "That the Delivery of the Plaintiff's Tick-"ets to the Defendant, as that Caſe was, was *no Change of* "*Property*." And moſt clearly it was NO *Change of the Property*: So far, the Caſe is right. But it is here urged as a Proof "that the true Owner may follow a *ſtolen Bank-Note*, "into what Hands ſoever it ſhall come."

Now the whole of that Caſe turns upon the throwing in *Bank-Notes*, as being LIKE to *Lottery Tickets*.

But Ld. Ch. J. *Holt* could never ſay "That an Action "would lie againſt the Perſon who, *for a valuable Conſide-"ration*, had received a *Bank Note* which had been ſtolen or "loſt, and *bona fide paid to him*;" even though the Action was brought *by the true Owner*: Becauſe he had determined *otherwiſe*, but two Years before; and becauſe Bank Notes are not like Lottery Tickets, but *Money*.

The Perſon who took down this Caſe, certainly miſunderſtood Lord Ch. J. *Holt*, or miſtook his Reaſons. For this Reaſoning would prove, (if it was true, as the Reporter repreſents it) that if a Man paid to a Goldſmith 500l. in Bank Notes, the Goldſmith could never pay them away.

A Bank Note is conſtantly and univerſally both at Home and Abroad, treated *as Money*, as *Caſh*; and paid and received, as *Caſh*: And it is neceſſary, for the Purpoſes of Commerce, that their *Currency* ſhould be *eſtabliſhed* and *ſecured*.

§ Walmeſly againſt Child, 11th December 1749.

§ There was a Caſe in the Court of Chancery, of Mr. *Child's* Notes, payable to the Perſon to whom they were given, or Bearer. The Notes had been loſt or deſtroyed many Years. Mr. *Child* was ready to pay them to the Widow and Adminiſtratrix of the Perſon to whom they were made payable; upon her giving Bond, with two reſponſible Sureties, (as is the Cuſtom in ſuch Caſes,) to indemnify Him againſt the Bearer, if the Notes ſhould ever be demanded. The Adminiſtratrix brought a Bill; which was diſmiſſed, becauſe ſhe either could not or would not give the Security required. No Diſpute ought to be made with the Bearer of a *Caſh Note*; in regard to *Commerce*, and for the Sake of the *Credit of theſe Notes*: Though it may be

* be both reaſonable and cuſtomary, to *ſtay* the Payment, *till** Inquiry can be made, Whether the Bearer of the Note came by it *fairly*, or not. * P. 460.

LORD MANSFIELD declared that the Court were All of the ſame Opinion, for the Plaintiff; And that Mr. Juſt. WILMOT concurred.

RULE—That the *Poſtea* be delivered to the PLAINTIFF.

Rex *verſ.* Dr. Shebbeare. Wedneſday 1ſt February 1758.

THE Doctor was brought up to be bailed: But had not Bail ready.

Note—He was now brought up by Virtue of a *Habeas Corpus* ISSUED by the Ld. Ch. Juſtice in the *Vacation*, returnable *immediatè*, before Himſelf *at his Chambers*.

Upon Dr. *Shebbeare*'s mentioning that He had been informed "that, as the Term was begun, it was neceſſary to "take out a *new* Writ of *Habeas Corpus*, to bring Him in-"to Court;" And the Officers on the Crown Side having ſaid that *their* Notion of the *Practice* was, "That, the "*Term being begun*, the *old* Writ was *expired*, and it was "neceſſary to take out a *new* One;"

LORD MANSFIELD declared the Court to be unanimouſly of Opinion That ſuch Notion was *ill founded*; That a Perſon *might* be brought into Court upon a *Habeas Corpus* iſſued in the *Vacation*; and that to require a new Writ, would be attended with Delay and Expence, without the leaſt Reaſon or Utility.

Lord MANSFIELD——If you have not Bail, We cannot commit you to the ſame Cuſtody you came hither in, (which was that of Mr. *Carrington*, One of the King's Meſſengers;) but muſt commit you to our Marſhal: And you will not then be obliged to ſue out your *Habeas Corpus* again: but may be brought up from the Priſon of this Court, by a *Rule* of Court, whenever you ſhall be prepared to give Bail.

Accordingly, the Doctor, being charged with two Warrants under the Hand and Seal of the Secretary of State, ** which appeared upon the Return to the *Habeas Corpus*, was ** See the Charge, poſt. pa.

COMMITTED to the Cuſtody of the *Marſhal* of this COURT.

Rex

* P. 461. Saturday, 4th February 1758.

* Rex *verſ.* Inhabitants of Flecknow.

H. 30 *G.* 2. No. 6.

THIS was a Cauſe in the Crown Paper, upon a ſpecial Caſe from the Aſſizes in *Warwickſhire*; upon an Indictment againſt the Inhabitants of the Hamlet of *Flecknow*, for *not repairing a Highway*, which the Indictment lays, "That THEY ought to repair."

The Inhabitants pleaded "that *One George Watſon ought* "to repair it, by reaſon of his Tenure; SO LONG *as* the "ſame ſhould *remain incloſed, &c.*" And traverſe that the Defendants, the Inhabitants, ought to repair it.

The Replication ſets out an Act of Parliament of 15 *G.* 2. *c.* (a private Act) "for incloſing and dividing the Com-"mon Fields called *Flecknow*, in the County of *Warwick*, "into juſt Allotments and Proportions; And alſo the ſeve-"ral Proceedings under it;" and then traverſes "that the "ſaid *George Watſon* by reaſon of his incloſing the ſaid High-"way, ought to repair and amend it, as often as there "ſhould be Occaſion, whilſt it ſhould remain ſo incloſed by "him, "*modo et forma prout* is alledged by the Plea: *Et hoc paratus eſt verificare.*

The Rejoinder admits the Act, and the Proceedings under it, and *George Watſon*'s Acceptance *&c.* under them; and alledges that *George Watſon* by reaſon of his incloſing, ought to repair *&c*: And of this they put themſelves upon their Country.—Iſſue is taken thereon; and a Verdict *pro Rege*, ſubject to the Opinion of this Court.

The Caſe ſtated, by Conſent of Counſel was (in Subſtance) thus—The *Inhabitants* of the Hamlet of *Flecknow* BEFORE *the making the Incloſure* by Virtue of the Act of Parliament in the Record mentioned, *were bound to repair* the Highway in Queſtion.

The *Road* in the Pleadings mentioned, was, *before* the Making the ſaid Act of Parliament, an ANCIENT OPEN *Road*, lying *un-incloſed*, without Hedge, Ditch or Fence; and continued to lie ſo unincloſed *at the Time* of making the ſaid Act of Parliament, and *until* the Incloſure thereof as herein mentioned.

The Commiſſioners appointed by the ſaid Act of Parliament did, *in Purſuance of the ſaid Act*, by their Award in Writing,

* Writing, *duly award, aſcertain, ſet out, direct*, and *appoint* "That there ſhould be at all times, for ever, after "the new Incloſure by the ſaid act directed to be made, "*A Public Way or Road*, leading from the Hamlet of "*Flecknow* aforeſaid, to *Southam* in the ſaid County of "*Warwick*, and alſo from *Southam* aforeſaid to *Flecknow* "aforeſaid (being the Road in Queſtion,) for Perſons to "paſs, either on foot, Horſeback, or with Cattle and "Carriages, into over and through the ALLOTMENT *of the* "*ſaid George Watſon*; And that the ſame ſhould be and re- "main at all Times for ever thereafter, *full forty Feet* "*broad*, as the ſame was then admeaſured and ſet out." And the Caſe ſtates that within One Year after making the ſaid Award, (that is to ſay, in *January* 1745,) the ſaid *George Watſon incloſed his Allotment*, purſuant to the ſaid Act of Parliament: And the Highway in queſtion *lay open and unincloſed* on each Side thereof as aforeſaid over the Lands Part of the Allotment of the ſaid *George Watſon*, for the Space of THREE *Years* next after the Incloſure of his ſaid Allotment ſo by him made as aforeſaid. * P. 462.

The ſaid *George Watſon at the End of* the ſaid THREE *Years*, INCLOSED *with Hedges Ditches and Fences* the ſaid Highway, on both Sides thereof, leaving the ſame full forty Feet broad between the Ditches: And the ſaid Road or Highway *remained ſo incloſed by* the ſaid *George Watſon*, during the whole Time mentioned in the Indictment.

The ſaid *George Watſon* made *no* Incloſure of the ſaid Highway in Queſtion, *other* than as aforeſaid.

A Verdict by Conſent was found by the Jury; Whereby the Defendants were found guilty; But ſuch Verdict was to be ſubject to the Opinion of this Court, upon the whole Caſe, as it appears on the Pleadings and on what appeared to be and was the Caſe as is before mentioned. And the

QUESTION ſubmitted is Whether the *Inhabitants* of the ſaid Hamlet of *Flecknow* CONTINUED *bound* to repair the Highway in the ſaid Indictment mentioned, NOTWITHSTANDING *the ſaid* INCLOSURE *by the ſaid George Watſon in manner before ſtated:* Or Whether, *by reaſon of* SUCH INCLOSURE, they were DISCHARGED therefrom, DURING *the Time* in the Indictment ſpecified.

Serj. *Hewitt pro Rege*, argued That the Inhabitants *remained* STILL *bound.*

It is admitted that this Hamlet of *Flecknow was bound to* repair *before the Act* of Parliament. And it does *not appear* that *George Watſon* is bound by having incloſed, under this Act of Parliament:

*P. 463. *For this is *no Incroachment, no injury to* the *Public, no Act* done *without Conſent.*

And the Caſes turn upon WANT *of lawful Authority.* 1 *Ro. Abr.* 390. Letter A. *pl.* 1. Sir *Edward Duncombe's* Caſe: Outlets are Parcel of the Highway, in an open Field. *Ibid.* Letter B. *pl.* 1. "The Subject may go out "of the beaten Track, when the way is founderous in an "open Field." *Sheppard's Epitome of the Law* 1116. "If a man incloſe the Highway, and put it within his "own Ground, the Pariſh is not to repair it; but He "muſt repair it himſelf:" 2 *Saund.* 160. *Rex* v. Sir *Nicholas Stoughton:* An Encroacher upon the Highway is obliged to repair, ſo long as the Encroachment continues. *Style* 364. "Whoever incloſes *&c.* takes upon him to repair."

But *this* Incloſure and Allotment is *under an Act of Parliament*; to which *Every Body conſents.* And this Act directs public and private Highways to be laid out: And it provides "That *No-Body* ſhall go upon *any other* High-"way." Therefore the old Right to the old Way is at an End, is annihilated: And ſo is the Way itſelf, being exchanged for the new One. And this, of Courſe, *warrants* the Incloſure.

But the Act lays no Charge upon the Owner: Therefore *George Watſon* cannot be ſaid to have incloſed any Part of the *Highway*: For this Land is allotted to him, as his *private Property*; And He is warranted in making this Incloſure.

This is juſt like the Caſe of a Writ of *Ad quod damnum*: It *is* indeed a *Parliamentary Ad quod damnum.* It may be even worth the inheritance of the Land, to repair the adjoining Highway. So that this is *not within the* PRINCIPLES which oblige Perſons incloſing, to repair. And if *George Watſon* be *not* obliged to repair this Highway, the Inhabitants of *Flecknow are* obliged.

Mr. *Caldecott contra* for the Defendants. This is an Indictment againſt the Inhabitants for not repairing: And it only charges "that they are bound."

The Plea ſets out by Way of Inducement "That one "*George Watſon by reaſon of his Incloſure*, ought to repair." And then tenders a Traverſe "*that the Inhabitants* OUGHT "NOT *to repair.*"

The Replication (inſtead of taking iſſue upon this Traverſe,) ſets out the Act of Parliament, and then ſets out all the Proceedings under it, and the Allotment to *George Watſon*, and this Acceptance thereof, and his Incloſing his Allotment, firſt, and the Road afterwards; and then takes quite another Traverſe, *viz.* "That He the "ſaid

"* ſaid *George Watſon*, is not, by his incloſing the * P. 464.
"Road, bound to repair it."

Cur'——We cannot meddle with the *Pleadings* now: We are upon the *Special Caſe*. If You have any Objection to the *Pleadings*, You muſt move in Arreſt of Judgment.

Mr. *Caldecott* then proceeded on the *Caſe*. This was a Road, which was always an open and un-incloſed Road, and went over *George Watſon*'s own Lands.

1ſt. This is no Incloſure, WITHIN *this Act*.

2d.—If it was, Yet the Act does *not take away the legal Conſequence* of Incloſure.

Firſt——This was an old open un-incloſed Road, over this *George Watſon's own* Lands. And the Act does not give any authority to incloſe it; nor could intend any ſuch Thing. And it is much better for the public, that it ſhould be opened and un-incloſed, than that it ſhould be incloſed. If He will incloſe it, He ought to repair it.

It is here ſtated that he did incloſe his *Allotment* within two Years (the Time limited for ſo doing:) But that he did not incloſe this *Road*, *till* THREE *Years* after the Commiſſioners Award. Therefore it is *not* an Incloſure *under* this Act: Conſequently, he *is liable* to repair.

I agree that if a Man incloſes on both ſides of a Road, he ſhall repair the Whole: And if *&c.* [See *Hawkins*, as below.] There is a great deal on this Subject in 1 *Hawk. P. C.* 202. *Lib.* 1. *c.* 76. § 6, 7. And I agree that a Man is bound to repair *no longer* than WHILST *he continues his Incloſure*: So that if he opens his Incloſure, he will be diſcharged.

As to an *Ad quod damnum*—It makes the old Road to become private Property: And there ought to be a Grant from the Crown.

But this Act of Parliament has *not directed an Incloſure* of the Road in Queſtion: *Neither* does the *Award of the Commiſſioners* direct it. Therefore *George Watſon* is in this obliged to repair; And the Inhabitants are not obliged,

Lord MANSFIELD ſtopped Mr. Serjeant *Hewitt* from replying: For this Caſe was too plain, He ſaid, to need a Reply.

* P. 465. * An Owner of Land over which there is an open Road, may *incloſe* it, by his *own* Authority; or *alter* it, under a *proper* Authority, and by a legal Courſe. 1ſt. He may *incloſe* it, by his OWN *Authority*: But then it muſt be upon *two Conditions*—One, "that he *is obliged to repair* it, TILL "he throws up the Incloſure;" the Other "that he leave "ſufficient Space and Room for the Road." 2dly. The Other Act, *viz. Altering* or *changing* the Road *by a legal Courſe*, is by a Writ of *Ad quod Damnum*: where the Application is to be made by the Owner of the Lands; and a Licence given by the King, upon a Finding by a Jury. But in this *latter* Caſe, the Owner of the Lands, is *not* obliged to repair the new Road; *unleſs* the Jury impoſe ſuch a Condition upon him: For if they do not, the Repair of the Roads ſtands juſt *as it did before*: even though it was at firſt open, and ſhould be directed by the Jury to be incloſed.

And this Caſe is *like* a Writ of *Ad quod damnum*; and not only ſo, but even *more* than a Writ of *Ad quod damnum*. For here, the Act veſts a Power in the Commiſſioners, to ſet out *new* Roads, by their Award. Therefore there is an *End* of the old Road, *as* an old Road. And the commiſſioners here made their Award: In which they deſcribe the future Road, and direct it to be 40 Feet broad, as it was then admeaſured.

And theſe Common Fields were not deſigned to continue open Fields, as they were before; but the Intent of the Act of Parliament was that they might be incloſed. And the Act ſays nothing about the Expence of repairing the Road. Therefore the Repair clearly *ſtands as it did before*; and was *certainly meant ſo to do*.

And every Man had a Right to incloſe, whoſe Lands adjoin to the Road. But if the Perſon to whom the Allotment was made near the Highway, was to be obliged to repair, it might have made a vaſt *Difference in the Value* of the Lands reſpectively allotted to each Perſon: For one Perſon's Allotment might perhaps run along very far, by the *Side* of the Highway; and another Perſon's Allotment *not lie at all near it*. And yet there is no Proviſion for any ſuch Caſe

Therefore this *George Watſon* is not, upon the Facts here ſtated to Us, obliged to repair, *by Reaſon* of his having *incloſed an open Road*: Nor indeed *is it an open Road*, under the Circumſtances of this Caſe.

The Pariſh were bound to repair, before the Act: And this Road happens to be the ſame identical Road, that was

* was the Road before the Act. And the Act of Parliament *never deſigned* to alter the Charge and Obligation of repairing the Roads over theſe Fields which were intended to be incloſed by virtue of it: Nor is this Incloſure thus made under this Act, *ſuch* an Incloſure as comes within the Meaning of the Law, which obliges the Perſon incloſing a Road *voluntarily* and of his own Head, to repair the Road which he has ſo *voluntarily* incloſed. * P. 466.

Mr. Juſt. DENISON concurred: And He thought this Caſe was very *properly* compared to the Caſe of an *Ad quod damnum*; and that it might be very properly called a *Parliamentary Ad quod damnum.*

And He was very clear that the *Hamlet were bound* to repair, *juſt as they were before:* And that *this* Incloſure was *not* ſuch an Incloſure as the Caſes cited intend.

Mr. Juſt. FOSTER likewiſe concurred. And He thought the Act *intended to give* the Perſon to whom an Allotment adjoining to the Road, ſhould be made, *Power to incloſe:* Or otherwiſe he might be a very great ſufferer by ſuch Allotment. And He was extremely clear that the *Hamlet remained bound* to Repair the Road, juſt as much as they were bound to repair before the Act.

Mr. Juſt. WILMOT concurred too, clearly: And the rather, for that if it was not ſo, the Allotment might prove what the Civil Law terms a *damnoſa Hæreditas.* And the Allotments to the different Perſons might be of extreme different Values, according as they lay near to, or far from the Road.

Upon all the Circumſtances of the Caſe, He was clear that the *Hamlet remained liable*, in the ſame Manner as they were before the Act.

Per Cur. unanimouſly.

RULE for the *Poſtea* to be delivered to the *Proſecutor.*

Turner *verſ.* Turner.

THE COURT (Mr. Juſt. FOSTER being gone) were unanimous, that a perſon VOLUNTARILY *inliſting* HIMSELF, was NOT *privileged from Arreſts*, within the *Act* of laſt Seſſions (30 *G.* 2. *c.* 8.) "for the ſpeedy and effectual Recruiting of his Majeſty's Land-Forces and Marines:" For that the Act was only meant to privilege SUCH Perſons from Arreſts, as were under that Act, * COMPELLED *againſt* their Wills, to ſerve as Soldiers.

* *V.* Section 20th, *pa.* 117, 118.

Sir

*P. 467. Tuesday, 7th February 1758.

*Sir Edward Worseley & al. Assignees of Richard Slader, a Bankrupt, *vers.* Demattos and Slader.

THE present Question came before this Court, after a Trial at Law before Lord *Mansfield*, upon a feigned Issue out of the Court of Chancery, to try, Whether one *Richard Slader*, a Trader was a Bankrupt; And (2dly.) *If* he was a Bankrupt, then *Upon* WHAT PARTICULAR *Day* he became so: And *that* particular Day on which he should be found to have become a Bankrupt, was to be *indorsed* upon the *Postea*.

It was soon agreed, as to the first Point, "That he cer- "tainly *did become* a Bankrupt," by an undoubted clear Act of Bankruptcy committed on the thirteenth of *November* 1756.

But, upon the second Point, as to the *Time when* he FIRST became a Bankrupt, it was insisted, on behalf of the Plaintiffs, That he became a Bankrupt *anterior* to that 13th of *November*, *viz. upon* the 23d of *October*; namely by the very *executing* the Deed in question which bore the latter Date. For they alledged this Deed to be *fraudulent*; and the Executing it, to be *ipso facto an Act of Bankruptcy*, within the Statute of 1 *Jac.* 1 *c.* 15; * which Statute expressly makes any fraudulent Grant or Conveyance of the Trader's Lands or Goods, whereby his Creditors may be defeated or delayed of their just Debts, a *specific Act of Bankruptcy*.

*V. §. 2. of that Act.

If the Deed was fraudulent, within the true Intent and Meaning of the Statute, He certainly committed an Act of Bankruptcy on the 23d of *October*: If it was *not*, He did not commit any Act of Bankruptcy till the 13th of *November*.

The Jury found Him a Bankrupt.

And, by Consent, the following Order was made at *Nisi prius*; *viz.* That either Party be at Liberty to move the Court. And if the Court shall, upon such motion, be of Opinion "That the Deed of 23d of *October* 1756, is, un- "der All the Circumstances, *fraudulent*, and the Execution "of it by *Richard Slader*, *an Act of Bankruptcy*,"—Then the *Postea* shall be marked on the Back thereof, "That the "said *R. S.* became a Bankrupt on the said 23d of *October* "1756: But if the said Court shall be of Opinion That "the Execution of the said Deed, under all the Circum- "stances, by the said *R. S.* be *not* an Act of Bankruptcy," Then the said *Postea* shall be marked on the Back, "That "the said *R. S.* became a Bankrupt on the 13th Day of "*November*."

The

* The Form of the *Rule*; under which it came before the Court was thus—" It is ordered that the Plaintiffs ſhew " Cauſe why the *Poſtea* in this Cauſe ſhould not be indorſ- " ed, that *Richard Slader* became a Bankrupt on the *thir-* " *teenth* Day of *November* 1756." * P. 468.

LORD MANSFIELD firſt repeated the whole Evidence very particularly and minutely: Which after the Counſel had done, was reſolved, by the Opinion of the whole Court, into the following Caſe; *viz.*

James Davis, an Agent of *Iſaac de Mattos*, *knowing Slader* to be indebted, and that he could not carry on his Trade, unleſs ſomebody in *London*, in the Nature of a Banker, would pay his Draughts, negociated, (in the Month of *July* 1756,) an Agreement between the ſaid *Iſaac de Mattos* and *Richard Slader*, " that *de Mattos* ſhould pay " *Slader*'s Draughts, upon having Security."

The Nature of the Security, and the Terms of Agreement, appear only by the Deed of the 23d of *October*; prepared, and procured to be executed, by *James Davis* and *James Whitehead*, Both of them Agents of *Iſaac de Mattos*.

The DEED in Queſtion bears Date the 23d of *October* 1756; and recites *Slader*'s Title to the Mill and Premiſſes: and alſo his being concerned in and carrying on divers Branches of Merchandize and other Buſineſs; and his having frequent Occaſion to draw and remit Sums of Money from and to *London*; and his having requeſted *Iſaac de Mattos* to be his agent or Banker there; And that in order to indemnify him for ſo doing, *Slader* had agreed to transfer and aſſign All his eſtate and Intereſt in the Premiſſes aforementioned in the ſaid Indentures, *and alſo* ALL *his Stock* uſed and employed in the Trades of Brewing and Making Malt, and in the Buſineſs of a Corn Factor and Miller, to the ſaid *Iſaac de Mattos* his Executors Adminiſtrators and Aſſigns, for that Purpoſe: And then the Deed imports that for the Purpoſes aforeſaid, and in Part of Performance of the ſaid Agreement, and in Conſideration of 5s. He the ſaid *Slader* Grants Aſſigns, *&c*, his ſaid Meſſuage, Corn Water-Mill, and divers other Things (ſubject to a Mortgage then ſubſiſting, on part thereof) And further, in full Performance of the ſaid Agreement, and for the Conſideration aforeſaid, He grants *&c*, ALL *his Stock*, *Utenſils*, *and other Things*, uſed in his Trades of Brewing and Malting, and of a Corn-factor and Miller; conſiſting of Coppers, Tuns, Backs, Coolers, Pumps, Ciſterns, Skreens, and *other* Implements; And ALSO ALL his *changeable Stock* conſiſting of Debts, Horſes, Carts, Caſks, Hops, Bear, Ale, Wheat, Barley, Malt, Coals, Wood, and ALL OTHER *Goods and Commodities* belonging employed or

* P. 469. * or made uſe of, *in the ſaid ſeveral Trades* or any of them; And all his Eſtate, Right, Title, Intereſt, Property, Claim, and Demand whatſoever thereto, and to every or any Part thereof; to the ſaid *Iſaac de Mattos*, his Executors &c. *Defeazanced* however, on his the ſaid *Slader*'s paying and making good to the ſaid *Iſaac de Mattos* All the Sums of Money which he ſhould advance and pay on any Note Draught Bill or other Writing of the ſaid *Slader*; and on his indemnifying *de Mattos* againſt the ſame, and all Matters any ways touching or concerning the ſaid Agency.

This Deed further contains the Common Covenants: And there is a Receipt indorſed for the 5*s*. Conſideration-Money.

In it is alſo a Covenant that in Caſe of Breach of or Failure in the Conditions &c, or any Part thereof, *then* and *from thenceforth*, it ſhould be lawful for the ſaid *Iſaac de Mattos* his Executors &c, TO ENTER, POSSESS *and* ENJOY the ſaid Land and Premiſſes &c; And ALSO *to take to his and* their own Uſe and Uſes, abſolutely, All and ſingular the Premiſſes *laſt* before-mentioned, *viz. the* STOCK, &c.

Upon the 8th of *October*, *Richard Slader* drew a Bill upon *Iſaac de Mattos*, by Authority from him for 200*l*. But, to give it Credit, It was made payable to the ſaid *James Davis*, and indorſed by him.

Upon the 23d of *October*, *Richard Slader* drew another Bill upon *Iſaac de Mattos*, by authority from him: But, to give it Credit, It was made payable to the ſaid *James Whitehead*, and indorſed by him.

Iſaac de Mattos himſelf *perſonally knew* that the Affairs of *Richard Slader* were in Confuſion; and *hired Samuel Sills*, whom He *ſent* down in the Month of *October*, to be *Book-keeper* to this *Richard Slader*. *Sills* accordingly went; and had examined all *Slader*'s Accounts and Affairs, by the 20th of *October*.

The Deed, (which had been a conſiderable Time preparing,) was executed on the 23d of *October*; and is *witneſſed* by the ſaid *James Whitehead*, *James Davis* and *Samuel Sills*.

The Bankrupt *continued in Poſſeſſion* of every Thing conveyed by the ſaid Deed. And *James Davis* took Occaſion to tell the Creditors of *Richard Slader*, "that the ſaid *Slader* "would *do very well*;" "that he had recommended him to "two good Men;" and "that *Slader* had given a Mort-"gage of the *Mill*, and *other Leaſe-hold* Premiſſes:" But *James Davis concealed* and did *not* mention *Slader*'s having aſſigned his GENERAL Effects.

Upon

* Upon the 11th of *November*, *Slader told Davis and Sills*, * P. 470. both together, "that he *could not ſtand*;" and conſulted them what to do: The Reſult of which Conſultation was—That *Sills*, by Order of *Slader*, the ſame Day, gave *Poſſeſſion to Davis*, as Agent of *de Mattos*, who immediately ſet out for *London*. The next Day, (the 12th of *November*,) *Slader* ordered *Sills* to deny him: On the 13th *Sills* did deny him accordingly; and told the Reaſon, "that it was *to commit* "An Act of Bankruptcy."

Slader had nothing of Value, *but* what was compriſed in the Deed of the 23d of *October*: And he traded as a Brewer, Malſter, Corn-factor, and Miller; but carried on *no other* Trade.

After the 13th of *November*, *Iſaac de Mattos* paid the ſaid two Draughts indorſed by *Davis* and *Whitehead*.

After Ld. *Mansfield* had reported the Evidence, the Counſel for the Plaintiffs proceeded to ſhew Cauſe: And they urged the Deed to be *merely colourable*, and ſo *fraudulent* as to conſtitute, in itſelf, an Act of Bankruptcy; being to the *Intent to defeat and delay* his Creditors, or *whereby they* MIGHT *be* DEFEATED *or* DELAYED.

They cited 3 *Co.* 80. *Twine*'s Caſe, and the Rules and Reſolutions contained in it, and urged that the preſent Caſe was fully within it.

They alſo cited 13 *Eliz. c.* 7. and 1 *Jac.* 1. *c.* 15. § 2: which goes further than 13 *Eliz.* Likewiſe 2 *Inſt.* 110. on the Statute of *Marlebridge*. 6 *Rep.* 76. *Curſon*'s Caſe S. P. *Moore* 193. Ld. *Pagett*'s Caſe, upon the Statute of Fugitives beyond Seas made *Anno* 13 *Eliz.* (In which they obſerved that 13 *Eliz. c.* 3. is in *Raſtal*, and not elſewhere.) *Style* 288. *Tucker* v. *Coſh.* 2 *Peere Wms.* 427. *Small* v. *Oudley et al.* Where a Goldſmith aſſigned $\frac{2}{3}$ of his Stock in the *Wine* Trade; And it was holden good: But *contra* if it had been of ALL his Goods, *&c.*

Alſo *Lucas's Rep.* 489. Dr. *Goodfellow*'s Caſe; and *Ryal* v. *Rowls* in *Canc.* 27th *January* 1749.

And they obſerved that here was no *Poſſeſſion* altered; no *Eſtimate or Account* taken of the Stock *&c*; nor any *Conſideration* paid.

The Counſel for the Defendants inſiſted, that even IF *it was granted* that this Deed was fraudulent, AS *againſt* Creditors or Purchaſers, yet it would NOT be an ACT OF BANKRUPTCY: For the * Act has a Proviſo to except Deeds made *bonâ fide* and upon *good* Conſideration. * 13 Eliz. c. 7. §. ult.

This

* P. 471. * This Deed was made *bonâ fide* and *upon good Conſideration*. It was made by Mr. *Slader*, a Trader in the Country, to ſecure Mr. *De Mattos*, who agreed to become his Banker or Agent in *London*; and to permit *Slader* from the Country, to draw upon him in Town: And the *only* INTENT *of it* was to indemnify *De Mattos* againſt *Slader*'s OVER *drawing*. *Unwin* v. *Oliver*, *in Canc. Tr.* 12 *G.* 2. was a like Caſe, determined by the Lord Chancellor. And this Tranſaction tended to enable the Country Trader the better to carry on his Trade; and was far from being intended to deceive his Creditors.

It muſt be agreed, that this Deed of Aſſignment *includes Goods and Utenſils*, as well as the Houſe and Mill *&c*; And that there was NO *previous Appraiſement*. But *that* was quite unneceſſary: Becauſe it could not be *then* known *how much* Money was to be ſecured.

As to the Owner's *continuing in Poſſeſſion*.—The Caſe of *Meggot* v. *Mills*, 1 *Ld. Raym.* 286. *B. R.* 1697. was ſo; and yet not fraudulent. *Precedents in Chancery* 285. *Bucknall et al'* v. *Roiſton* was the like. And in the Nature of the Thing, Poſſeſſion could not be delivered in the preſent Caſe; becauſe the Debt to be ſecured was future and uncertain. So that *this Continuing in Poſſeſſion* was *no mala Fides*, *no Badge or Evidence of Fraud*: Becauſe it did not give the Owner *a falſe and fallacious Credit*. Neither was it *ſecret*; but notorious: And it was NOT *with Intent to defeat and delay* his Creditors; but to their Benefit, and calculated to ſupport *Slader*'s Credit, and to enable him to pay his Creditors.

The GENERALITY of a Deed is *not always* and *neceſſarily* an *Evidence of Fraud*: For unleſs there be a *Truſt*, either expreſſed or implied, there is no Fraud: And here is no Truſt, either expreſſed or implied: Nor could *De Mattos* recover more than was fairly owing to him.

The Caſe of *Ryal* v. *Rowls* was rightly determined, "that "a Security may be loſt, by ſuffering a Continuance in Poſ-"ſeſſion." But it does not follow that our Continuance in Poſſeſſion *conſtituted an Act of* BANKRUPTCY. Here was neither Impoſition nor Colluſion: It is only a Mortgage of his Perſonal Property, and for a fair Conſideration.

To prove it NOT to be an *Act of Bankruptcy*, they cited ſeveral Caſes. In the Caſe of *De Gols* v. *Ward*, in 1739, the *quo animo* was indeed clear and plain. The next Caſe where a Deed was conſidered as an Act of Bankruptcy, was *Aſhley*'s

* *Aſhley*'s Caſe: But that was alſo quite clear. So again in *Mackrell*'s Caſe, lately: Where it was indeed given up. But there is *nothing* INTENTIONALLY *ill*, in the preſent Caſe. *P. 472.

If this mere giving Security to indemnify his Banker was an Act of Bankruptcy, It could NEVER *afterwards* BE PURGED: Which would be a great inconvenience to Trade; becauſe it is a common Caſe. And this Man gave it to his *former* Banker, as well as to *De Mattos*.

It is no Act of Bankruptcy, unleſs the Deed be FRAUDULENT, as well as intended to give *unjuſt Preference to one Creditor* before Another And there is no Pretence in the preſent Caſe, that any bad Uſe has been made of this Deed.

The 5th Clauſe in 1 *Jac.* 1. *c.* 15. would be nugatory, if the ſecond was to be underſtood to make the executing ſuch a Deed as this, an *ipſo facto* Act of Bankruptcy. It was only a *contingent* and *collateral* Security, depending upon *future* Events and Circumſtances: And therefore there could not, in the Nature of the Thing, be either *Delivery of immediate Poſſeſſion*, or *any Particular Conſideration-Money* expreſſed. And *De Mattos*'s being *liable* to be damnified was, of itſelf alone, a *good Conſideration*.

The Caſe of *Unwin* v. *Oliver*, *P.* 12 *G.* 2. *in Canc.* was this: *Unwin*, being appointed Receiver by the Court, and thereupon obliged to give Security, aſſigns his Debts, as a Security (amongſt other Things) to the Perſons who were bound for him in a Recognizance upon that Occaſion: And afterwards he became Bankrupt. *This Aſſignment* of his Debts was holden good.

Bankruptcy is conſidered by the Acts of Parliament as a CRIME. The Deſcription of an Act of Bankruptcy, or of a Perſon's becoming Bankrupt, muſt be therefore taken *ſtrictly*: And the Acts that conſtitute Bankruptcy muſt be done *with Intent* to defraud or delay Creditors.

Put the Caſe of an Officer in the Revenue appointing *a Trader* his *Deputy*; And, for his Indemnity, *taking* from ſuch Deputy, *ſuch a Deed as this* is: Would the *Executing* it make the Trader a Bankrupt?

The Act of 21 *Jac.* 1. *c.* 19. § 10, 11. takes Care of any Inconvenience to the Creditors, ariſing from the Trader's continuing in Poſſeſſion. But ſuch Aſſignments have *never* been conſidered as conſtituting an *Act of Bankruptcy*. *Small* v. *Oudley*, 2 *Peere Wms.* 427. *Jacob* v. *Shepherd*, there cited.

Ryal

* P. 473. * *Ryal* v. *Rowls, in Canc.* 27 *January* 1749: Which was an Aſſignment by *Harveſt* the Bankrupt, of *all* his Goods Utenſils *&c*, and was made liable to *future* Monies to be advanced.

The Counſel for the Plaintiffs in Reply, urged the Inconvenience that muſt ariſe to Trade, from ſuch *General* Aſſignments of *All* a Trader's Effects in Trade, *un*-valued and *un*-appraiſed; in Order to ſecure *eventual Debts*, *not* exiſting at the Time of executing the Deed: And inſiſted that 1 *Jac.* 1. *c.* 15 § 2. *expreſsly makes* ſuch Conveyances *Acts of Bankruptcy*.

Here is *no Conſideration* of any Money paid, or any Debt really contracted. Nor was any Money *afterwards advanced* upon this Deed. And for what was *then owing* to Mr. *De Mattos*, he had at *that* Time a *Warrant of Attorney*, to confeſs and enter up a *Judgment:* Though it was afterwards deſtroyed, when he actually took poſſeſſion under the Deed now in Queſtion.

And indeed IF *there* HAD *been a real* Debt ſubſiſting, Yet *this* had been an *undue Preference*, within the Act. But as it was *not* ſo, nor any Thing done in Conſequence of this Deed, it is merely *fraudulent*.

None of the Caſes, on either Side, are in Point.

In *Unwin*'s Caſe, there was a Conſideration: For an *Indemnity* is a *good Conſideration*. And the Caſe goes no further than to prove " that it is ſo."

But of moveables Chattels, *Poſſeſſion* ought to be inſtantly and *actually* given: And of immoveable or remote Chattels, Poſſeſſion of every *Title* to it, and every Thing that can in the Nature of the Thing, be done *towards* it.

Whereas here was *no Attempt* to take Poſſeſſion, *till* the Man was determinately going to become Bankrupt, by a plain indiſputable Act, on the 11th of *November*.

Therefore this *General* Proviſion for *one* particular Creditor, *implied a ſecret Truſt* or conciliating Favour: Which is a Badge of *Fraud and Colluſion*. And no Argument can be drawn from Mortgages of *Land*, (where it is the *uſual* Method for the Mortgager to remain in Poſſeſſion) to the keeping Poſſeſſion of *Goods* aſſigned over. And if this had been an honeſt Tranſaction, there would have been an *Appraiſement* and a *Schedule*; and it would not have been left *thus at large*.

As

* As to its not being to be afterwards *purged*;—That does not alter the Caſe at all: For no Act of Bankruptcy can be purged, but by obtaining a Certificate. * P. 474.

As to 21 *Jac.* 1. *c.* 19. § 11. Continuing in poſſeſſion was always looked upon as an *Evidence* of Fraud: That Law is only *declarative* of what was the Law before.

The Caſes cited of *Ward*, *Aſhley*, and *Mackrell*, prove Nothing againſt Us, at all.

Lord MANSFIELD ſaid the Court would conſider it, both upon the particular Circumſtances, and upon the general Principles: And it would be proper to conſider the Subject, with regard to *Traders in General*, under 13 *Eliz. c.* 7. as well as to Traders *becoming Bankrupts*. And they would give Notice when they were ready to declare their Opinion.

Lord MANSFIELD now delivered the Opinion of the Court.

The Queſtion is, Whether upon *all the above circumſtances*, *Slader* became a Bankrupt on the 23d of *October*, or on the 13th of *November*.——And the *Poſtea* is to be indorſed, as to the *Time* of *Slader*'s becoming Bankrupt, according to the Opinion of the Court.

All the Acts concerning Bankrupts are to be taken together, as making *One Syſtem* of Law: They are All to be conſtrued *favourably for Creditors*, and to *ſuppreſs Fraud*.

"Whether a Tranſaction be fair, or fraudulent," is often a Queſtion of * *Law*: It is the *Judgment of Law*, upon Facts and Intents. * Vide ante 397. accord.

The *Indemnity*, which is the Conſideration of the Deed in queſtion, I allow to be a good, valuable, and true Conſideration: And I allow this Deed to be a valid Tranſaction, AS between the *Parties*.

But valid Tranſactions, as between the *Parties*, may be fraudulent by Reaſon of Covin, Colluſion, or Confederacy to injure a *third* Perſon: For Inſtance—*A.* buys an Eſtate from *B.* and forgets to regiſter his Purchaſe Deeds: If *C.* with expreſs or implied Notice of this, buys the Eſtate for a full Price, and gets his Deeds regiſtered; This is fraudulent, becauſe he aſſiſts *B.* to injure *A.* Or, if a Man knowing that a Creditor has obtained a Judgment againſt his Debtor, buys the Debtor's Goods for a full Price, to enable

*P. 475. * enable him to defeat the Creditor's Execution: It is fraudulent. Again, If a Man, knowing "that an Exe-"cutor is waſting and turning the Teſtator's Eſtate into "Money, the more eaſily to run away with it," buys from the Executor, with that View, though for a full Price; It is fraudulent.

Marriage-Brocage Bonds, ſecret Agreements, different from the open Treaty of Marriage, and many other Caſes that might be put, though for a true and valuable Conſideration, as between the *Parties*, are fraudulent, by Reaſon of Deceit or Injury conſequentially brought upon *third* Perſons.

* 3 Co. 80. b. 81. a. * *Twyne's* Caſe, even in a Criminal Proſecution was of this Sort: The Conſideration of the Sale was more than ſufficient, and undoubtedly true.

Whether *this* Deed be of that Sort, will depend upon the whole Purpoſe of it.

As to All, except the Leaſehold, It could not have the Effect of a Conveyance, if *De Mattos* permitted *Slader* to *continue in Poſſeſſion*.

By the expreſs Tenor of the Deed, *Slader* was to have the abſolute Order and Diſpoſition as before. In fact, he was permitted to continue in Poſſeſſion, and *act as Owner*. They who dealt with him, truſted to his viſible Trade and Stock. They truſted to the Bankrupt-Law that he could neither have ſold or mortgaged; and in Caſe of a Misfortune, that his Effects might be equally diſtributed. They were impoſed upon by *falſe Appearances*.

To deceive the more, under a fictitious Shew of Credit, the Bills drawn upon *De Mattos* were made payable to and indorſed by his *own Agents*. *Davis*, One of his Agents, expreſsly told the Creditors, "That *Slader* would do very "well; That two good Men, upon Security of the Leaſe-"hold, would pay his Draughts:" But *concealed* that he had mortgaged any Thing elſe.

A falſe Shew, by Colluſion, to deceive third Perſons is generally connected with a *ſecret Confidence*. So here, the Truſt put in *Slader* manifeſtly was, That when he could ſtand no longer, he ſhould give Notice to *De Mattos* or his Agents, deliver Poſſeſſion, and then commit a poſitive Act of Bankruptcy.

From the Nature of the Fund, Poſſeſſion never could be meant to be taken, but as the immediate Fore-runner of a Commiſſion of Bankruptcy. He could not ſtand a Moment, after

after his whole Trade, fixed and fluctuating Stock, and Credits were taken from him. * P. 476.

To watch *Slader*, *De Mattos* put *Sills* about him, as his Book-keeper. Agreeably to the Confidence put in him, when *Slader* ſaw he could ſtand no longer, He acquainted *Sills* and *Davis* the Agents of *De Mattos*, with it; and *by their Advice*, firſt gave an Order to deliver Poſſeſſion, and then to be denied. This ſhews, to a Demonſtration, that they were all aware that *Poſſeſſion was neceſſary*; and intended from the firſt, by a formal Delivery of Poſſeſſion, when he was determined to break, to evade the * Clauſe in 21 *Jac.* 1. *c.* 19. For the Meaſure was inſtantly taken, without any new Advice. * § 11.

I will conſider this Tranſaction more particularly in two great Views:

1. In Reſpect to the *End*;

2dly. In Reſpect of the *Means*.

As to the firſt—The *End* propoſed by the ſecret Truſt was, that in Caſe, *Slader* ſhould become Bankrupt, his whole Eſtate ſhould firſt be veſted in *De Mattos*, for Payment of what was juſtly due to him. The *Preference* aimed at was *fraudulent* and *unlawful*.

Suppoſe, *after* the Conſultation on the 11th of *November*, this Deed had been prepared and executed, accompanied with ſuch formal Delivery of Poſſeſſion: We are of Opinion, that it would have been *fraudulent*, and an *Act* of Bankruptcy.

Such *Preference* is a Fraud upon the whole Bankrupt Law, and would defeat the two mean Objects it has in View; to wit, the *Management* of the Bankrupt's Eſtate; and an *equal Diſtribution* among his Creditors.

The Law gives the *Management*, to Perſons choſen by the *Creditors*, under the Direction of Commiſſioners, and the Control of the Great Seal.

But, if a Bankrupt may convey all to a favourite and friendly Creditor, juſt before he orders himſelf to be denied; The whole Power of ſelling his Effects, calling in his Debts, and ſettling his Accounts, muſt be in *ſuch* Single and particular Creditor: *He* muſt have a Right even to the Cuſtody of the Books and Papers.

An

* P. 477. * An *equal Diſtribution* among Creditors who equally gave a general perſonal Credit to the Bankrupt, is anxiouſly provided for, ever ſince the Act of 21 *Jac.* 1. *c.* 19.

* § 9. It was thought miſchievous, to ſuffer Priorities to be gained by *ſecret Liens*; as * by Judgment, Statute, Recognizance, Bond, Specialties, Attachments by Cuſtom in

† § 10. *London* or elſewhere, Aſſignment of Debt to the † King's Debtor. Unleſs they took out Execution, theſe All equally gave a perſonal Credit to the Bankrupt, and truſted *him* to manage his Effects.

* § 11. Conveyances of perſonal Chattels by way of Security, where *Poſſeſſion* was left * *with the Bankrupt*, fell within the ſame Reaſon.

† § 11. LAND is held, *without* Perception of the Profits, by the TITLE: But there is *no* Hold of GOODS, which the Mortgagor is allowed to poſſeſs and diſpoſe of. Therefore by a † Clauſe in the ſame Act, any Priority by ſuch *ſecret* Lien is alſo taken away; and, as ſuch Mortgagee equally gives a general Credit, He is levelled with the *other* Creditors.

But, if a Bankrupt may, juſt before he orders himſelf to be denied, convey *All*, to pay the Debts of *Favourites*; the worſt and the moſt dangerous Priority would prevail, depending merely upon the unjuſt or corrupt *Partiality* of the Bankrupt.

* Gayner Bankrupt. Ex parte Foord and others. † 31ſt July 1755.

A* Caſe lately happened, where a Conveyance calculated to *poſtpone* one Creditor to the reſt, was held an Act of Bankruptcy. It came on before Ld. *Hardwicke*, the late Ld. Chancellor, at *Lincoln's-Inn Hall*. † One *Gayner*, a Trader, had made an Aſſignment on the 7th of *June* 1755, of all his Effects, Goods, Stock in Trade, and Book-Debts, (Except Houſhold Goods, Watches, Plate, Bills of Exchange, Inland Bills, Promiſſory Notes, and Caſh then by him,) to Truſtees in Truſt to pay themſelves and all the reſt of his Creditors, *except Foord the Petitioner*. But the Truſtees declining to act under *this* Aſſignment; He executed *another*, on the 9th of *June* 1755: Wherein the Truſtees were to pay themſelves, and all the Creditors mentioned in a *Schedule*; (in which Schedule, the Petitioner was *not* included:) And in this ſecond Aſſignment a large Parcel of *Ginger*, as well as the Things above-mentioned were excepted.

The Petitioner inſiſted that he *alone* could chooſe Aſſignees; ſince the *other* Creditors claimed under the *Aſſignment*.

Ld. *Hardwicke* was clear, "that the *executing* the Deed "of the 9th of *June* was an *Act* of Bankruptcy." And all

* all that had heard his Determination, were of the ſame Opinion; And every Body concerned acquieſced in it. Whereupon the Creditors mentioned in the Schedule, conſented to wave all Benefit or advantage under that Aſſignment; and all proved their Debts, in order to receive an equal Dividend with the Petitioner: And the Creditors proceeded to a Choice of new Aſſignees. * P. 478.

The Framers of this Deed executed by *Gayner*, took for granted, "that if it had been a Conveyance of *all* his Ef-"fects it muſt be bad;" and therefore they *colourably excepted Parts*. But the Contrivance did not prevail, even ſo far as to bear an Argument; or to be thought, by any Body, worthy of a Trial.

There is a great Difference between the Conveyance of *All*, and of a *Part*. A Conveyance of a *Part* may be public, fair and honeſt; As a Trader may *ſell*; ſo he may *openly transfer* many Kinds of Property, by way of *Security*. But a conveyance of ALL, muſt either be fraudulently kept ſecret: or produce an immediate abſolute Bankruptcy.

It has been argued, "that *after a Reſolution* taken by a "Trader, to commit an Act of Bankruptcy, the Trader "ſo reſolving to become Bankrupt, might lawfully prefer "a juſt Creditor by conveying *Part* of his Effects, to ſa-"tisfy that Creditor's Debt."

It is not neceſſary to determine that Queſtion, in *this* Cauſe; for here the Conveyance is of ALL; And therefore I will only ſay, that no ſuch Propoſition is yet *eſtabliſhed*; much leſs, in the *Extent* whereto it has been urged.

The Caſes mentioned, were * *Cock* v. *Goodfellow*; † *Jacob* v. *Shepherd*; ‡ *Small* v. *Oudley*; and *Unwin* v. *Oliver*. * V. Lucas 489. † Cited in 2 Peere Williams, 430, 431. ‡ 2 Peere Williams, 427,

In the Caſe of *Cock* v. *Goodfellow*, the Fact did not give Riſe to any Queſtion. An immediate proſpect of a certain Bankruptcy was *not the Motive* to what Mrs. *Cock* did. She was *ſolvent* at the Time; and, that very Day, lent 40,000*l*. Beſides, her Children, to whom She was Guardian and Truſtee, were not upon the Foot of *Common* Creditors: The Court of Chancery would have decreed Her to place their Fortunes out upon Government or real Securities.

As to the Caſe of *Jacob* v. *Sheppard*, I have looked into the Regiſter's Book, upon this Occaſion: And I have a Note of it, as ſtated by Ld. *Hardwicke* in the Cauſe of *Bourne* v *Dodſon*. And it was this—

Mr. *Thomas Leigh*, (the Bankrupt,) who was a *Turkey*-Merchant, by Deed dated the 8th of *June* 1709, ſold

*P. 479. * and conveyed *particular Goods* in the Hands of His Factors, to Mr. *William Snelling*; upon Truſt to apply the Money ariſing thereby, in Satisfaction, in the firſt Place, of a Debt of 1500*l.* due to *Snelling* himſelf; and then of a Debt of 1551*l.* and Intereſt due to *Geo. Morley*; and out of the Reſidue, to pay *ſuch* of the Bankrupt's Creditors, as He, with *Morley*'s Conſent *ſhould direct:* And if there ſhould be any Surplus after the ſaid *Snelling*'s and *Morley*'s Debts were paid, and ſuch Sums for which they were Bail or Security for the ſaid Bankrupt, the ſame was to be paid to the ſaid Bankrupt his Executors, Adminiſtrators and Aſſigns.

Afterwards by Deed dated 16th *December* 1709, and by Deed dated 20th *January* 1709, other Debts were appointed to be paid, *agreeable to the Power* reſerved by the Former Deed.

On the 11th of *February* 1709, *Thomas Leigh* failed, and committed an acknowledged Act of Bakruptcy: And a Commiſſion was taken out, and his Eſtate and Effects aſſigned.

The Truſts of the Deed of the 8th *of June* 1709, were *immediately* and *openly* carried into Execution; So that no Queſtion ever did or could ariſe upon the * Clauſe of 21 *Jac.* 1. *c.* 19. But the Aſſignees brought a Bill againſt all the Parties claiming under the Deed of the 8th of *June* 1709, and the ſubſequent Deeds; "to have them ſet aſide; and "to have an Account of the Money which they had re-"ceived;" upon two Grounds; 1ſt. That the Deeds were obtained by Fraud and Impoſition on *Leigh* the *Bankrupt*; 2dly. That they were an Impoſition upon the *other Creditors.*

* § 11.

The Cauſe came on to be heard at the *Rolls*, upon the 16th of *June* 1725. Sir *Jo. Jekyll* took time to conſider of it; and ordered all the Pleadings and Proofs to be left with Him; and upon the 17th of *December*, Sir *Joſeph* gave Judgment. He thought theſe Deeds could not be looked upon, or ſet aſide, (upon the former Ground, *viz.*) as a Fraud upon the *Bankrupt:* But He declared the ſaid Deeds to be FRAUDULENT, and an Impoſition upon the *Creditors* of the Bankrupt; And decreed them to be *ſet aſide*, with Coſts.

In making this Decree, He went upon right Principles; but did not attend to its being a *Bankruptcy*, if it was *really* fraudulent: And that a Court of Equity could not decree it to be fraudulent, unleſs it was fraudulent *at Law*; in which Caſe, it would conſtitute an *Act* of Bankruptcy, of itſelf.

On the 6th of *Auguſt* 1726, Ld. *King*, upon an Appeal, directed an Iſſue at Law, to try, "Whether by the Exe-

"cution

" * cution of the Deed of the 8th of *June* 1709, *Thomas* * P. 480.
" *Leigh* became a Bankrupt; or at any other, and what
" Time." The Jury found he became a Bankrupt on 11th *February* 1709.

Upon the Equity reſerved, Ld. *King eſtabliſhed* the Deeds; held the Plaintiffs to be only intitled to the Surplus, *after* the Truſts in the Deeds were performed; and decreed the proper Accounts againſt the Defendants, of the Money they had received, in Order to find out that Surplus.

Many very obvious Obſervations occur upon this Caſe.

Sir *Joſeph Jekyll* was ſo ſtruck with the Objections of Fraud from Preference, that He ſet aſide the Deeds, with Coſts.

Ld. *King* reverſed his Decree; becauſe no Deed made by a Trader can be fraudulent in *Chancery*, which is not fraudulent in a Court of *Law*, and an *Act* of Bankruptcy. Therefore he directed an *Iſſue*.

There might be many Reaſons, *why* it was *not found fraudulent*, upon the Trial. The Deed was executed the 8th of *June*, of *ſpecific* Goods; and was *immediately carried into Execution*. The Act of Bankruptcy was not till the 11th of *February* following: And I ſee no Suggeſtion that *in June Leigh thought* of committing an Act of Bankruptcy. Beſides, one Ground upon which the Aſſignee brought his Bill, was " Fraud and Impoſition upon the " *Bankrupt himſelf*, in obtaining the Deeds:" Therefore, moſt probably, he was frightened into giving this Security, by Threats of *legal* Diligence againſt him.

The Caſe of *Small* v. *Oudley* was determined very ſoon after; *viz.* upon the 4th of *December* 1727. The beſt Report of it, is in 2d *P. Wms.* 427: But is no where fully ſtated. I have a Copy of the Decree from the Regiſter's Book; as follows———

On the 21ſt of *September* 1720, *Small* (to accommodate *Daniel* and *Joſeph Nercott*, Brothers, Goldſmiths and Partners, upon a preſſing Occaſion,) transferred to them 500*l.* S. S. Stock; upon their engaging " to transfer to him the " like Sum in the S. S. Stock in a Week or ten Days at " fartheſt," and giving a Note for that Purpoſe.

They ſold the S. S. Stock for 1800*l.*

On the 29th of *September* 1720, they made the Aſſignment of *their Share in a Wine-Partnerſhip* with *Oudley*, carried

*P.481. * ried on ſolely in *his* Name, (in which they had two Thirds, and *Oudley* One Third :) as a *Security for transferring* 500*l.* S. S. Stock ; and reciting the Truth of the Caſe.

They, at the *ſame Time*, aſſigned two *Leaſe-hold* Eſtates to *Small* for the ſame Purpoſe.

Their Intereſt in the Wine Trade was *but* 300*l.* And *Oudley* had a Right to carry on the Trade till *Chriſtmas* 1723. The Bill, (which was againſt *Oudley*, and againſt the Aſſignee under a commiſſion iſſued againſt the *Nercotts*,) was not brought by *Small*, till after that Time : But an Iſſue had been directed in another Cauſe, to try " Whe- " ther the ſaid *Nercotts* were Bankrupts at the Time they " executed an Aſſignment to *Small* of a Leaſe of certain " Houſes, on the *ſaid* 29th of *September* 1720.

The above Facts are admitted by the Anſwers ; *no Fraud* is ſuggeſted ; and they do not mention any Deſire to have the *Time* of the Bankruptcy tried over again.

* pa. 429 to 431. Sir *Joſeph Jekyll*, in 2 *Peere Wms.* * gives ſtrong Reaſons *againſt* the Decree he thought Himſelf *bound* to make, becauſe Ld. *King* had juſt eſtabliſhed, " That a Deed by a " Bankrupt could not be ſet aſide, as fraudulent in Chan- " cery."

This Caſe too was *very particular*. The Fraud was upon *Small* ; and not upon the Creditors : His Stock was to be replaced, in a Week or ten Days *at fartheſt*, by the original Agreement. 1800*l.* of *Small's Money*, went to the Creditors : And this Security amounted *but* to about 300*l.* So that the whole Tranſaction was *beneficial* to the Bankrupt's Creditors. The S. S. Stock was got from *Small*, with a View to *ſave* the *Nercotts* from breaking. The Security was given, at the *very time* they were *obliged to replace* the 500*l.* S. S. Stock : and there was no Pretence that *Small* afterwards permitted them to *continue* one Moment in *Poſſeſſion*.

* Stephen and Morley Unwin againſt Oliver et al' The Caſe of *Unwin* v. *Oliver*, * *T.* 12. *G.* 2. is not entered in the Regiſter's Book: But I have ſeen a fuller Note of it, than was cited at the Bar.

Aſſignees of Martin Unwin, a Bankrupt : Eaſter Term 1739.

It was an Aſſignment of ſeveral Debts metioned in a Schedule ; to indemnify his Securities in a Recognizance. *Martin Unwin* had been appointed Receiver of a Lunatic's Eſtate : And the Plaintiffs became his ſecurities, by Recognizance, " that he ſhould account for what he ſhould " receive under the Orders of the Court." Two Years after, *Martin Unwin*, by Deed reciting " that 60*l.* was " due from him to the Lunatic's Eſtate," aſſigned to the Plaintiffs

* Plaintiffs ſeveral Debts mentioned in a Schedule annexed to the Aſſignment; To diſcharge the 604*l.* and to indemnify them againſt this Security which they had entered into for Him. A Month after this Aſſignment, *Martin Unwin* became a Bankrupt. * P. 482.

The Act of Bankruptcy was admitted to be a *Month* after the Aſſignment. *No* Queſtion was made upon the Clauſe in the 21 *Ja.* 1. *c.* 19. And there was *no* Suggeſtion, "that the immediate Proſpect of a certain Bankruptcy was "the Cauſe of the Aſſignment."

Lord HARDWICKE held that it could not be ſet aſide as fraudulent *in Chancery*; unleſs it was fraudulent in a *Court of Law* and an Act of Bankruptcy. And He held "that *Indemnity* was a *good* Conſideration:" Of which, there can be no Doubt.

But 2dly. (to conſider this Tranſaction, in reſpect of the *Means*) Suppoſe a Bankrupt could, after a Reſolution to commit an Act of Bankruptcy, prefer one of his Creditors, by an Aſſignment of *All*; (which We think He cannot;) Yet in *this* Caſe, the MEANS to attain ſuch Preference were *fraudulent*. A *falſe Credit* is induſtriouſly given the Bankrupt, upon a *ſecret Truſt* "to deliver Poſſeſſion *ſo as to* "*avoid* the Clauſe in the 21 *Ja.* 1. *c.* 19.

The ſecond Argument of Fraud in *Twyne's* Caſe, * is "—"The Donor *continued in Poſſeſſion* and uſed them *as his* "*own*; and by *Means thereof*, traded with others, and "deceived and defrauded them." * 3 Co. 81. a.

BUT, three Caſes have been cited to ſhew, "That upon a *Mortgage* of Goods by a Trader, the Leaving Poſſeſſion does *not* infer Fraud; though it may, upon an *abſolute Sale*. Theſe are the Caſes of *Meggott* v. *Mills et al'* 1 *Ld. Raym.* 286; *Bucknal et al'* v. *Roiſton*, in *Precedents in Chancery* 285; and *Ryal* v. *Rowls*, in Chancery, 27th *January* 1749.

The firſt is a direct Authority to the *contrary*. For Ld. Ch. J. *Holt* ſays, "If theſe Goods of *Wilſon's* had been aſ-"ſigned to any *other* Creditor, the Keeping of the Poſ-"ſeſſion of them had made the Bill of Sale fraudulent, as "to the other Creditors." But He very juſtly diſtinguiſhed that Caſe; and ſeems to have conſidered the Landlord (who lent his Tenant Money to buy the Goods, to furniſh his Houſe,) as the original Owner of the Goods.

Bucknal et al' v. *Roiſton* was *not* a Caſe of *Bankruptcy*, but upon the Courſe of *Adminiſtration of Aſſets*, (where ſecret

* P. 483. * V. Precedents in Chancery, pa. 267. Where Lord Chancellor admits, "Sale void,

* cret Liens give Priority: and is *expreſsly* * *diſtinguiſhed*, by my Lord Chancellor, from the Caſe of a *Bankrupt*. Beſides, the Poſſeſſion was there a Truſt under an Authority to negotiate and ſell; and could not be meant to give any *falſe Credit*.

"that in Caſe of a Bankrupt, ſuch Keeping Poſſeſſion would make the "againſt his Creditors."

In the Caſe of *Ryal* v. *Rowls*, the Act of Bankruptcy upon which the Commiſſion proceeded, was *long after* the Mortgages; the Aſſignees *did not wiſh* to carry it farther back; and therefore *never objected* "that the Bankrupt's "keeping Poſſeſſion made the Mortgages fraudulent:" But if they had, in *that* Caſe the Preſumption of Fraud would have been *diſproved*. The ſame Fund was mortgaged ſix Times over: They All truſted to their Conveyances, (like Mortgages of Land,) as a *Title*, without Poſſeſſion; though a Bankruptcy ſhould happen. They *miſtook* the Law; but did not *evade* it.

Whereas here, the Parties manifeſtly were *aware* "that "Poſſeſſion was *neceſſary*:" The ſolemn Determination in the Caſe of *Ryal* v. *Rowls* had made that Point *notorious*. Poſſeſſion was here left, upon a *ſecret Truſt* "to deliver it "*ſo as to avoid* the Clauſe in 21 *Ja.* 1. *c.* 19." Which *in Fact*, was accordingly *done*.

Objections. Two General Objections, from Inconvenience, have been urged: Which deſerve an Anſwer.

1ſt Objection. 1ſt. That it will *hurt Credit*, if Traders may not raiſe Money by mortgaging their Goods without quitting Poſſeſſion.

Anſwer. The Policy of the Bankrupt Law introduced by 21 *Ja.* 1. *c.* 19. and followed ever ſince, is to *level* All Creditors, who have not actually recovered Satisfaction, or got hold of a Pledge which the Bankrupt could not defeat.

A Trader is truſted upon his Character, and *viſible* Commerce: That *Credit* enables him to acquire Wealth. If by *ſecret Liens*, a few might ſwallow up All; It would greatly *damp that Credit*.

If he mortgages and *parts with the Poſſeſſion* of Goods, the World has *Notice*: But, to give Priority from mortgaging Goods, of which the Trader is allowed to act and appear *as the Owner*, would be enabling him to *impoſe* upon Mankind; and draw them in by *falſe Appearances*.

No Injuſtice is done to ſuch Mortgagee; becauſe he really truſts only to the *general* Credit of the Trader: The Conveyance is not a Fraud againſt *him*, but againſt his *other Creditors*.

Mortgages

* Mortgages of *Land* are checked by the *Title:* But where Poſſeſſion is not delivered, *Goods* may be mortgaged a hundred Times over, and open a plentiful Source of *Deceit.* *P. 484.

The other General Objection from Inconvenience was, "That a fraudulent Deed is an Act of Bankruptcy, upon "the Face of it; and *can never be purged.*" 2d Objection.

I am ſorry the Phraſe has crept into Uſe: Becauſe it *confounds* the Idea which ought to be annexed to it.

Every equivocal Fact may be *explained by Circumſtances.* If a Trader orders himſelf to be *denied,* Circumſtances may ſhew, that he did not do it *to avoid Payment*; but on Account of Sickneſs, or particular Buſineſs. So if he *leaves his Houſe,* Circumſtances may ſhew, it was not *to abſcond.*

Of all the equivocal Facts which can amount to Acts of Bankruptcy, *Deeds* are the moſt open to be explained by a Variety of Circumſtances. Hardly any Deed is fraudulent upon the mere *Face* of it. It is a *good* Sale, if the Conſideration be true; *fraudulent,* if falſe; *good,* if Poſſeſſion immediately follows; *bad,* if it do not: Nay, the *not Taking Poſſeſſion* being *only Evidence* of Fraud, may be *explained.*

The *Uſe* to which a Deed is applied, ſhews *quo animo* it was made. Leaving Poſſeſſion till after the Act of Bankruptcy, in the Caſe of *Ryal* v. *Rowls,* ſhewed there was *no* Fraud; and that they truſted to the Conveyance.

In *this* Caſe, the Conſultation and Delivery of Poſſeſſion upon the 11th of *November, proves the ſecret Truſt,* in Confidence of which, the falſe Credit was given the Bankrupt before; It ſhews that evading the Clauſe in 21 *Ja.* 1. *c.* 19. was in the *View* and *Contemplation* of the Parties. There was *no other Reaſon* for delivering Poſſeſſion on the 11th of *November:* Becauſe no Default had happened, which gave *De Mattos* more Pretence to enter *then,* than *before.*

Under all the Circumſtances, We are of Opinion That this Conveyance of the Bankrupt's *whole* Subſtance to *De Mattos, though* by way of Security, and for valuable conſideration, is *fraudulent* and an *Act of Bankruptcy.*

The Determination *here,* is upon the Aſſignment *of* All.

Per Cur. The *Poſtea* muſt be indorſed, "That *Richard* 'Slader became Bankrupt on *the* 23*d* of October."

Rex

*P. 485. * Rex *verſ.* Wakefield et al'.

Wedneſday 8 February 1758.

MR. *Harriſon* had obtained a Rule, in *Michaelmas* Term 1755, to ſhew Cauſe Why an Order of two Juſtices, made upon *ſeveral Quakers*, (for Payment of Tithes under the Value of Ten Pounds to the Curate of a Chapel) and confirmed at the Seſſions, upon an Appeal from it, ſhould not be quaſhed; together with the Order of Seſſions confirming it. See 7, 8 *W.* 3. *c.* 34. and 1 *G.* 1. *St.* 2. *c.* 6. § 2.

Mr. *Norton*, in *Michaelmas* Term laſt (*viz.* on 26th *November* 1757.) ſhewed Cauſe. He gave up the Order of Seſſions, as not maintainable; But defended the *Original* Order.

To this Original Order, Mr. *Harriſon* had taken 4 Exceptions: Which were now ſupported by him and Mr. *Clayton*. Theſe Exceptions were as follow:

1. It is a *joint* Order made on DIFFERENT *Perſons*, for *diſtinct* Non-Payments of *different Tythes:* Whereas there ought to have been *a diſtinct* Order on EACH. In 1 *Strange* 471. *Between the Pariſhes of Chewton* and *Compton Martin*, the Removal of two different Families of Paupers by One Order, was holden bad; Though the Pariſhes were the ſame.

2d. The TITLE *is in Queſtion:* Therefore the Juſtices have *no Juriſdiction*. The Exception in the Act of 1 *Geo.* 1. *Stat.* 2. *c.* 6. § 2. is "*Unleſs* the *Titles* of ſuch Dues "Tithes or Payments ſhall be in Queſtion." And theſe Words "Unleſs *&c.*" extend to this *whole* Clauſe; and are not confined to the granting a *Certiorari* only. And this Fact, of the Title being in queſtion appeared, as Mr. *Harriſon* alledged, upon the Granting the *Certiorari*, in the preſent Caſe.

3d. *Non conſtat* that the two Juſtices who made this Original Order, are "*neither* PATRONS *nor* INTERESTED in the "Tithes." But 1 *G.* 1 *c.* 6. § 2. requires that they ſhall be neither One nor the Other. Now they ought *expreſsly* to AVER and *ſhew* (negatively) "that they *are not*." Or elſe they have no Juriſdiction, by the very Words of the Act; The Juriſdiction being given to "Any two or more Juſ-"tices *&c.* OTHER *than* ſuch as *&c.*

4th.

* 4th. It does *not ſufficiently aſcertain and ſtate* WHAT is due and payable by the Defendants; or at leaſt, * FOR *what*, the reſpective Sums are due. ‡ One Sum is "1s. 6d. "being *due to the Curate*;" not ſaying FOR *what*. Another is,—"being the *Value* of their ancient cuſtomary Pay-"ments." Another is—"4s. *being ancient cuſtomary* Pay-"ments."

* P. 486. * V. 7, 8 W. 3. c. 34. § 4. N. B. The Act does not require the latter.

‡ This Objection is not ſupported by the Act.

This Order was made on the Act of 1 *G.* 1. *Stat.* 2. *c.* 6. § 2. which extends the 7, 8 *W.* 3. *c.* 34. § 4, to ALL *Payments* to Miniſters or Curates officiating in Churches or Chapels. (*V.* that Statute of 7, 8 *W.* 3. *c.* 34. §. 4: which extends *only* to *Tithes* and *Church-Rates*.)

Mr. *Norton contra* anſwered theſe Objections. The Subſtance of his Defence againſt them was fully ſufficient, if true: For He denied the 1ſt, to be *material*; And denied the three laſt, to be well founded.

The Matter was adjourned to *Monday* 28th *November*.

Then, this Motion being mentioned again,—

The COURT inquired "Whether the Return of the "*Certiorari* was filed."

And Lord MANSFIELD ſaid He had called for, and read the Affidavits made for obtaining the *Certiorari*, and upon the ſhewing Cauſe.

Mr. Juſt. DENISON mentioned a Caſe of *Rex* v. *Furnes*, *B. R. H.* 6 *Geo.* 1. upon a *Certiorari* to remove an Order made upon the Act of 7, 8 *W.* 3. *c.* 6, for Payment of ſmall Tithes: Where Ld. Ch. J. PRATT thought that where the RIGHT *was in queſtion*, ſuch Caſes were *never intended to be* the Subject of that Act of Parliament. He ſaid, this was only ſpoken from a Note which He had ſeen: But it ſhould ſeem to be right * and true; and the rather, from a Caſe of *Rex* v. *Furneſs* being mentioned in 1 *Strange* 264. where an Order for Non-Payment of ſmall Tithes made on 7, 8 *W.* 3. *c.* 6, was quaſhed.

* It is right and true: At leaſt, I have a MS. Note of the ſame Caſe of the Sta-Right is a-

to the ſame Effect, or ſtronger; (For mine ſays "*Per Cur.* The Deſign "tute was only to give a ſpeedy Remedy for ſmall Tithes where the greed.")

Adjourned to the preſent Term.

Lord MANSFIELD now delivered the Opinion of the Court.

He began with ſtating the two Acts of 7, 8 *W.* 3. *c.* 34. (§ 4,) and 1 *G.* 1. *Stat.* 2. *c.* 6, (§ 2,) The former relates only to great and ſmall *Tithes* and *Church*-Rates; and is temporary. The latter makes it perpetual and extends it

to

P. 487. " to *any* Tithes or Rates, or *any* Cuſtomary or other " *Rights Dues* or *Payments* belonging to any Church, " *or Chapel*, which, of Right by Law and Cuſtom " ought to be paid, for the Stipend or Maintenance " of any Miniſter or Curate officiating in any Church or " Chapel." And Both Acts direct " that the Proceedings " ſhall not be removed into any other Court, *unleſs the* " *Title* ſhall be in Queſtion."

It is upon the *laſt* Act, that the preſent Order was made.

A *Certiorari* has iſſued, to remove the Order into this Court: And it came on, upon Exceptions to the Order. Both Sides made very material Objections,—One Side, to the Order; for that the Juſtices had no Juriſdiction, *becauſe* the Title *was* in Queſtion: The Other, to the *Certiorari*; for that no *Certiorari* could iſſue, by the expreſs Proviſion of the Act, to remove the Proceedings from before the Juſtices into any other Court, becauſe the Title was not in queſtion.

The Act was made in *Favour* to, and for the *Eaſe* and *Benefit* of QUAKERS; and to ſave them from troubleſome and expenſive Proſecutions: But it *never meant*, that a *mere Scruple* of theirs, or an OBSTINATE *With-holding* of the Tithes ſhould be any Hindrance to the Matter's being determined by the Juſtices of Peace. *This* would have fruſtrated the very Intention of the Act: Which meant to give this Juriſdiction to the Juſtices in *that very Caſe*; where the *real Right and Title* to them ſhould not be in Diſpute between the Parties.

Then his Lordſhip directed the Affidavits on which the *Certiorari* was granted to be read.

It was therein ſworn on the Part of the Defendants, " That the Defendants CONTROVERTED *the Title* to the " Tithes, before the Juſtices;" and alſo, " That the Title " to the Tithes *was then* and *at the Time* of making the ſaid " Affidavit, REALLY *in Queſtion*."

The Juſtices had Notice to ſhew Cauſe againſt the *Certiorari*.

On ſhewing ſuch Cauſe, Five old Inhabitants of the Chapelry ſwear by their Affidavit " That ſuch cuſtomary Sti- " pends or Payments *have always been paid* to the Curate " by the Land-Holders, *without* any Sort of Scruple or " Objection *except* LATELY *by the Quakers:*" And *no Other* Perſons diſpute it. And theſe 5 Perſons alſo ſwear " That they believe them *to be due*; And that the *former* " *Owners of theſe very Lands* (which had been purchaſed " about 4 Years ago, by theſe Quakers,) DID PAY *for them*, as " other

* "other Perſons did, in the ſaid Chapelry;" And theſe * P. 488.
Quakers purchaſed the Lands *as ſubject* to ſuch Payments.

——Theſe are the Affidavits *upon which* the *Certiorari* was granted.

Now if this GENERAL *Allegation* "of the Quakers *Con-* "*troverting the Title*," and the *conſequential Aſſertion* "that "the Title *was in* QUESTION," (without any further Particulars, or ſhewing at all *upon what* FOOT they controverted the Payment) ſhould be eſteemed a ſufficient Ground for removing the Orders, It would put a *total End* to theſe Acts of Parliament, and *evade* the very Deſign and Intention of making them.

For the Quakers might pretend that they are obliged in Conſcience to refuſe or controvert the Payment of theſe Demands; and conſequently, to queſtion and deny the Right to receive them. Now that is the *very Thing* the Acts mean to provide a Summary Remedy for. The intention was, that in *ſuch* Caſe, the Juſtices ſhould make an Order to *compel* them to pay.

Their Affidavits are general, "That they controverted "the Title; and that it was really in queſtion."

Whereas by the Affidavits made by the 5 old Inhabitants, it is very plain that the *former Owners* of theſe very Lands have *always paid*; and that theſe Quakers, who are the Subject of this Order, have *no Pretence* to diſpute it, upon any other Foot than their own *general Scruple* to pay any Demands of this Nature: Which theſe Acts are, for their *own Eaſe and Advantage*, calculated to *compel* them to do, in a Method the moſt *gentle* and *convenient for themſelves* (who ſcruple to pay *without* Compulſion.)

We are All of Opinion, as to the Merits of the Caſe, that the Title is *not ſo* controverted, or *ſo* in Queſtion, as that the Juſtices can be precluded from Juriſdiction, or their Order be regularly and properly removed into any other Court.

And We are All of Opinion, that the Rule for the *Certiorari* having been made abſolute, and the Return thereto having been filed, ought not now to ſtand in the Way, and prevent our Coming at the Real Juſtice and Merits of the Caſe: For if the *Certiorari* iſſued *improvidè*, We can Order it to be *ſuperſeded*; and the *Return to be taken off the File.*

There

* P. 489. * I ſuppoſe He meant the Caſes of (a) Rex v. Eliz. Nicholls, Paſ. 18 G. 2. B. R. And (b) Rex v. Govers, Paſ. 28 G. 2. B. R.

* There have been * ſeveral inſtances of this—(*a*) One was where an Order of two Juſtices was appealed from; and before the Time when the Appeal ſhould in Courſe have come on at the Seſſions, a *Certiorari* was brought to remove the Order: And, becauſe the *Certiorari* was brought before the Time of hearing the Appeal was come, the *Certiorari* was quaſhed, and the Return taken off the File.

The (*b*) Other was a *Certiorari* to remove an Indictment from the *Old Bailey*: And it appearing to this Court, that *They* could not give Judgment, but that the *Seſſions* of *Oyer* and *Terminer* at the *Old Bailey* ought to do it; the like Method was taken, And it was ſent back to the Court below, for *them* to pronounce the Judgment.

Therefore, upon this Caſe, We are all of opinion That the Writ of *Certiorari* be ſuperſeded (*quia improvidè emanavit*;) the Return taken off the File; And the Order remanded.

His Lordſhip added this Hint, to be obſerved in future Caſes of this Sort; *viz.* That upon All Orders of this Kind, the great and material Point muſt be "Whether the TITLE TO *the Tithes was* REALLY *in queſtion*, or not;" and ought to be determined, before the *Certiorari* iſſues.

Thurſday, 9th February 1758.

Godin et al'. *verſ.* London Aſſurance Company.

THIS was a Point reſerved at *Niſi prius*, before Lord *Mansfield* at *Guildhall*.

The Queſtion ſtrongly litigated there, was "Whether "the Plaintiff ought to recover his WHOLE Loſs, or only HALF;" It being objected "that there was a "DOUBLE Inſurance."

A Verdict was found for the *Whole*, ſubject to the Opinion of the Court: And if the Court ſhould think, upon his Lordſhip's Report, "that the Plaintiff, by Law, ought "to recover for *Half* his Loſs *only*, "then the Verdict to be entered up as for *Half*.

* P. 490. * It was argued, Yeſterday, by ſeveral Counſel on each Side: And, this Day

Lord MANSFIELD delivered the Opinion of the Court.

He began with ſtating the Facts, as they appeared to Him at the Trial; Which were theſe—

Mr.

Mr. *Meybohm*, of *St. Peterſburgh*, had Dealings with Mr. *Amyand* and Company, of *London*; Who often ſent Ships from *London*, to Mr. *Meybohm* at *St. Peterſburgh*.

Meybohm, as appeared by the Evidence, was *indebted*. on the *Balance* of their Accounts, to *Amyand* and Company.

Amyand and Company ſent a Ship, called the *Galloway*, *Stephen Baker* Maſter, to Mr. *Meybohm* at *St. Peterſburgh*. to fetch certain Goods.

Meybohm ſent the Goods; and promiſed to ſend the Bill of Lading by the next Poſt, but never did.

Afterwards, *viz.* in *Auguſt* 1756, *Amyand* and Company got a Policy of Inſurance from private Inſurers, for 1100*l.* on the *Ship Tackle and Goods*, at and *from London to St. Peterſburgh*, and at and from thence *back again to London*; which Policy was ſigned by ſeveral private Underwriters, quite different Perſons from the preſent Defendants: And of this Sum of 1100*l.* thus underwritten, 500*l.* was declared to be on $\frac{11}{60}$ Parts of the *Ship*; And the remaining 600*l.* to be on *Goods*.

Between 26th *Auguſt* and 28th *September* 1756, (Both included,) Mr. *Amyand* inſured 800*l.* more, with other private Inſurers: And this latter Inſurance was upon *Goods only*; and was *only* at and *from St. Peterſburgh to London*.

On 28th, 29th, and 30th of *October* 1756, Mr. *Amyand* inſured 900*l.* more, with other private Inſurers: Which *laſt* Inſurance was on *Goods only*, at and from the SOUND to *London*.

So that the whole Sum thus inſured by *Amyand* and Company, was, 2800*l.* Of which 2800*l.* the Sum of 2300*l.* was on *Goods*; the remaining 500*l.* was on the *Ship*.

Several *Letters* being given in Evidence, It appeared that *Meybohm* wrote from *Peterſburgh* on 7th *September* 1756, (the Date of his firſt Letter on this Subject,) to *Amyand* and Company; and mentioned what Goods he ſhould ſend * to them, referring to the Invoice for the Particulars; and directed *them* to get *Inſurance thereon*, and to place the Goods and the Inſurance to a particular Account which he named in his Letter; in which He alſo ſpecified ſome Iron, which was for Mr. *Amyand*'s own Account. * P. 491.

This Letter Mr. *Amyand* afterwards received, (probably, about the 27th of *October*:) And *in Conſequence* of it, made the

the Insurance accordingly, upon the 28th, 29th and 30th of the same *October*, as before mentioned.

Meybohm, having shipped the Goods, *indorsed the Bills of Lading* to One Mr. *John Tamesz* in *Moscow*, (the Plaintiff, in Effect, in the present Action:) Who on the 7th *October* 1756, wrote to his Correspondent Mr. *Uhthoff*, here in *London*, "*to insure* these Goods" In this Letter, He desires Mr. *Uhthoff* to *insure the whole*, "that He (*Tamesz*) might "be *safe in all Events*; For He suspected that these Goods "were intended to be consigned by *Meybohm* to some Body "else, and perhaps *might be insured by some other Persons*:" And He says, they were transferred to Him, in Consideration of his being in Advance to *Meybohm* more than their Amount. This Letter from Mr. *Tamesz*, with these Directions "to insure," was received by Mr. *Uhthoff*, on the 15th of *November* 1756.

Mr. *Uhthoff* accordingly applied to the Defendants, the *London* Assurance Company; and *disclosed* to them, at the same Time, All the Particulars: And they, upon the 16th of *November* 1756, AFTER *being thus* APPRISED "*that there* "*might be* ANOTHER *Insurance*," made the Insurance now in question, for 2316*l.* on the *Goods* at and *from the* SOUND to *London*. The Good were *lost*, in the Voyage.

Mr. *Uhthoff*'s Insurance was made by the Plaintiffs *Godin Guion* and Company, who are Insurance Brokers; And they declare that this Insurance (which is expressed to be made by them, "as well in their own Names, as for and in the "Name and Names of all and every *Other* Person or Per-"sons to whom the same doth may or shall *appertain*, in "Part or all,") was made by Order of *Henry Uhthoff* Esq. This Declaration is indorsed upon the Policy; and is dated 18th *November* 1756.

There is no Doubt, as to the Value of the Goods, or as to the Loss of them. And it is admitted by the Defendants, That the Plaintiff ought to recover *Half* the Loss from "*Them*:" But they say, they ought to pay *only Half*, *not* the *Whole* of the Loss. So that the only Question is,

"Whether the Plaintiff is intitled, upon the Circumstan-
* P. 492. "ces of this Case, and upon the Facts I have been stating,
"* to recover the WHOLE Loss *from the present Defend-*
"*ants*; Or *only* the HALF of his Loss from *Them*, and the
"Remainder from the Under-Writers of Mr. *Amyand*'s
"Policy."

The Verdict is found for the Plaintiff, for the *Whole*: But it is agreed to be subject to the Opinion of this Court, upon the Question I have just mentioned.

First

First—To conſider it, *as between* the *Inſurer* and *Inſured.*

As between *them,* and upon the Foot of Commutative Juſtice merely, there is no Colour why the Inſurers ſhould not pay the Inſured the *Whole:* For they have received a *Premium* for the *whole* Riſque.

Before the Introduction of *Wagering* Policies, It was, upon Principles of Convenience, very wiſely eſtabliſhed, "That a Man ſhould *not* recover *more* than He had loſt." Inſurance was conſidered as an *Indemnity only,* in Caſe of a Loſs: And therefore the Satisfaction *ought not to exceed* the Loſs. This Rule was calculated to prevent Fraud; Leſt the Temptation of Gain ſhould occaſion unfair and wilful Loſſes.

If the Inſured is to receive *but One* Satisfaction, Natural Juſtice ſays that the ſeveral Inſurers ſhall All of them *contribute pro rata,* to ſatisfy that Loſs againſt which they have *All* inſured.

No particular Caſes are to be found, upon this Head: Or, at leaſt, None have been cited by the Counſel on either Side.

Where a Man makes a *double* Inſurance of the *ſame* Thing, in ſuch a Manner that He can clearly recover, againſt ſeveral Inſurers in diſtinct Policies, a *double* Satisfaction, The Law certainly ſays, "That He *ought not* to recover doubly "for the *ſame Loſs,* but be content with *One ſingle Satis-* "*faction* for it." And if the ſame Man really, and for his own proper Account, inſures the ſame Goods doubly, tho' both Inſurances be not made in his own Name, but One or both of them in the *Name* of *another Perſon,* Yet that is juſt the ſame Thing: For the *ſame Perſon* is to have the *Benefit of both* Policies. And if the *Whole* ſhould be recovered from *One,* He ought to ſtand in the Place of the Inſured, to receive *Contribution* from the Other, who was equally liable to pay the Whole.

The Act of 19 *G.* 2. *c.* 37. (made to regulate Inſurances and for Prevention of wagering Policies,) expreſsly *prohibits* the *Re-aſſuring,* (after having already inſured the ſame Thing;) *Unleſs* the former Aſſurer ſhall be inſolvent, or become a Bankrupt, or die: And it provides * that even in *thoſe* Caſes, it ſhall be *expreſſed* in the Policy "*to be a Re-* "*Aſſurance.*" So that, here, if Mr. *Tameſz* had Himſelf made a ſecond Aſſurance upon the ſame Goods, and was to have had the *Benefit of both* Aſſurances Himſelf, it had been within this Act.

* v. § 3. * P. 493.

But *if Tameſz* was *not* to have the Benefit of both Policies *in all Events,* then it can never be conſidered as a *double* Policy.

It

Objection. It has been ſaid "That the *Indorſement* of the Bills of "Lading *transferred* MEYBOHM's *Intereſt* in all Policies by "which the Cargo aſſigned was inſured; And therefore "*Tameſz* has a *Right* to Mr. *Amyand's Policy*;" and "that "*Tameſz*, being the Aſſignee of *Meybohm*, is the *Ceſtuy qui* "*Truſt* of it, and may recover the Money inſured;" And even "that He may bring *Trover*, or *Detinue*, for the very "Policy itſelf:" And it is urged from hence, "That He either "will or *may* have a *double* Satisfaction for the *ſame* Loſs."

Anſwer.— But, allowing "that by the Indorſement of the Bills of "Lading and Aſſigning the Cargo to *Tameſz*, He ſtands "in the *Place of* MEYBOHM in reſpect of *his* Inſurances;" Yet Mr. *Amyand* has an Intereſt of his *own*, and had actually inſured the Ship and Goods, and the ſum of 1900*l.* (upon both together,) *prior* to any Directions or Intimation received from Mr. *Meybohm*, "to inſure for HIM." *Various People* may inſure VARIOUS INTERESTS, on the ſame Bottom: (As one Perſon for Goods; another, for Bottomree, *&c.*,) And here, Mr. *Amyand* had an Intereſt of *his own*, diſtinct from the Intereſt of *Meybohm*: He had a *Lien upon theſe very Goods*, as a Factor to whom a Balance was due. And He had the *ſole* Intereſt in the *Ship:* Which was a Part of the Things inſured by Him. It is far from appearing, "that even his *laſt* Inſurance (in *October*) was made on the "Account of *Meybohm*, or as Agent for *Him*." So far from it, Mr. *Amyand* inſiſts upon it for his *own Benefit*, (as He expreſsly declared at the Trial,) and abſolutely *refuſes to give it up* or to ſuffer his *Name* to be uſed by the Plaintiff; though He was a Witneſs for the Defendants, and was produced by them, and inclined to ſerve them. So that the *Foundation* of this Argument, urged by the Defendants Counſel, *fails* them; And there is, in Reality, *Nothing to ſupport it*.

But even ſuppoſing "that Mr. *Amyand* had made his In"ſurance, not upon his own Account, but *as Agent or* "*Factor* for Mr. *Meybohm*, and upon the *Account of Mey*"*bohm*;" Yet *even then*, *Tameſz* can *never* come againſt *Amyand*'s Underwriters, or come at *Amyand*'s Policy, to his own uſe. For Mr. *Amyand*, the Factor for *Meybohm*, has *Poſſeſſion* of the Policy, and appears to have been a *Creditor* of *Meybohm*'s upon the Balance of Accounts between
* P. 494. * them at the Time when He made the Inſurance: And I take it to be now a ſettled Point, "that a FACTOR, *to whom* "*a Balance is due*, has a LIEN *upon all Goods of his Princi*"*pal, ſo long* as they remain in his *Poſſeſſion*." *Kruzer et al. Wilcox et al.* was a Caſe in Chancery upon this Head.
* 12th March 1754. * It came on firſt, before Sir *John Strange* then Maſter of the Rolls: Who decreed an Account; and directed Allowances to be made for what the Factor had expended

on

on Account of the Ship or Cargo; and reſerved All further Directions, till after the Maſter's Report. It came on again, afterwards, for further Directions, after the Maſter's Report, before the Lord Chancellor; who was attended by four eminent Merchants, who were interrogated by him publickly. After which, He took Time to conſider of it; And on 1ſt *February* 1755, decreed "that the Factor "has a *Lien* on Goods conſigned to him; not only for inci-"dent Charges, but as an Item of mutual Account for the "*general Balance* due to Him, *ſo long* as he retains the *Poſ-*"*ſeſſion.* But if he *parts with the Poſſeſſion* of the "Goods, He *parts with his Lien*; becauſe it can not "then be retained as an Item for the general Account." And there was another Caſe, in the ſame Court, of *Gardiner* v. *Coleman*, a few ‡ Months after; in which, the former Caſe, determined as I have mentioned, was conſidered as a Point ſettled; And this latter Caſe of *Gardiner* v. *Coleman*, was decreed agreeably to it. So that Mr. *Amyand*, *even* conſidered as *Factor or Agent* to *Meybohm*, and as making the Inſurance upon *Meybohm*'s Account, is yet intitled to *retain* the Policy; *Meybohm* being *indebted to Him* upon the *Balance* of the Account between them: And He has a *Lien* upon the Policy, *whilſt* it continues in *his Poſſeſſion:* Therefore, even in *this* View of the Caſe, Mr. *Tameſz* muſt firſt have paid to Mr. *Amyand* the Balance of his (*Amyand*'s) Account, before he could have gotten that Policy out of Mr. *Amyand*'s Hands: And conſequently, Mr. *Tameſz* was very far from being intitled to the Benefit of it, as a *Ceſtuy qui truſt*, abſolutely and intirely.

‡ 2d June 1755.

But *if* the Queſtion "Whether *Tameſz* could take Be-"nefit of Mr. *Amyand*'s Policy," were *doubtful*; Yet, here, *Tameſz* inſured the Goods with the Defendants, *expreſsly under the Declaration* of his Suſpicion "that there "might have been a former Conſignation, and ſome *former* "*Inſurance* made upon the Goods by ſome *other* Perſon;" But He deſired to inſure the *Whole*, for his *own* Security. And to this, the Defendants *agreed*; and took the *whole Premium*. Mr. *Amyand* inſiſted upon his Right to the *whole* Benefit of his *own* Policy, when He was examined as a Witneſs; and is now litigating it in Chancery. It would neither be juſt nor reaſonable, that *Tameſz* ſhould only recover *Half* of his Loſs from the Defendants, and be turned round, for the *other Half*, to the uncertain Event of a long and expenſive Litigation. I do not believe there ever will or can be any Recovery by *Tameſz* or thoſe who ſhall ſtand in his Place * againſt *Amyand*'s Underwriters. However, *if* thoſe Underwriters are liable to contribute at all, the contribution ought to be amongſt the *ſeveral Inſurers* themſelves: But *Tameſz* the *Inſured*, has a Right to recover his

* P. 495.

WHOLE Loſs *from the Defendants*, upon the Policy now in Queſtion, by which *They* are bound to pay the *Whole*. For though here be *two* Inſurances, yet it is *not* a DOUBLE Inſurance: To call it ſo, is only confounding Terms. IF *Tameſz* could recover againſt *both* Sets of Inſurers, Yet He certainly could not recover againſt the Underwriters of *Amyand*'s Policy, *without* ſome *Expence*; nor *without* alſo firſt paying and reimburſing to Mr. *Amyand* the *Premium* He paid, and alſo his *Charges*. This is by no Means within the *Idea* of a DOUBLE Inſurance. Two Perſons may inſure two *different Intereſts*; Each, to the whole Value; As the Maſter, for Wages; the Owner, for Freight *&c.* But a DOUBLE Inſurance is where the *ſame* Man is to receive *two Sums inſtead of One*, or the ſame Sum *twice over*, for the *ſame Loſs*, by reaſon of his having made two Inſurances upon the ſame Goods or the ſame Ship. Mr. *Tameſz* is intitled to receive the whole from the Defendants, upon *their* Policy; whatever ſhall become of Mr. *Amyand*'s Policy: And *They* will have a Right, in caſe He *can* claim any Thing under Mr. *Amyand*'s Policy to *ſtand in his Place*, for a *Contribution* to be paid by the other Underwriters *to* THEM. But ſtill *They* are certainly obliged to pay the *Whole* to HIM.

Therefore, upon theſe Grounds and Principles, in *every Light* in which the Caſe can be put, We are All of Us clearly of Opinion, "That the Verdict is right, as it now "ſtands, for the WHOLE; and that the

"POSTEA be delivered to the PLAINTIFF."
RULE accord.

Rex *verſ.* Inhabitants of Biſhop's *Hatfield*.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, No. 141. pa. 439.

* Roſſel qui tam &c. *verſ.* Kitchen.

*P. 497.

Saturday, 11th Feb. 1758.

ON *Thurſday* 26th *January* laſt, Mr. *Whitaker* moved in Arreſt of Judgment, after a Verdict for the Plaintiff in a *qui tam* Action upon the Statute of 1. *Ja.* 1. *c.* 22. ("the Duty of Tanners, Curriers, Shoemakers, *and of* "OTHERS *cutting of Leather*") A Rule was then made "to bring in the *Poſtea*" And the *Poſtea* being now brought in, Mr. *Whitaker* and Mr. *Nares* objected—

1ſt.

1ſt. That the Defendant is *not an Object* of this Act.

It is not alledged in the Declaration "that the *Defendant was a Tanner*, Currier, Shoemaker *or other Perſon occupied in* the cutting of Leather:" Which the *Preamble* ſhews that *he ought* to be. *Cro. Car.* 587, *Lodge* v. *Hollowell*, is an Action brought upon another Clauſe of this Act: And there *it is* alledged "that the Defendant was a "Currier &c." * *Brown's Entries*, , on the Act againſt buying and ſelling live Cattle—The Defendant is here alledged to be a Butcher. †

* The Words there are—"That the § 38. are,

"Defendant being a Currier &c" † But N. B. Here the Words of "that every Perſon."

They relied upon the *Preamble* of the Act, rather than the enacting Part; and argued that *Both* muſt be taken together.

* 2d. Objection—This Action is brought upon a Suppoſition, and under an Allegation, that a *Third* Part of the *Penalty belongs to the Dean and Chapter of Weſtminſter, as Lords of the Liberty where the* OFFENCE *was committed.*" Whereas by the Act of Parliament this third Part of the Penalty muſt belong to the City of *London*, when the Offence is committed WITHIN THREE MILES *of the City:* Although the *Place where* the Offence was committed, be NOT, in any *other* Reſpect, *ſituated within* the ſaid City or its Liberties. * P. 498.

For the 50th Section of this Act gives to the *Mayor of London a* JURISDICTION *extending to* ALL *Places* * *within* 3 *Miles* of that City: And at the ſame time, EXCLUDES All others in general, and all the other Juriſdictions thereby eſtabliſhed in particular, *from having* ANY *Juriſdiction at all, within* three miles of the ſaid City. So that if the City of *London* have not Juriſdiction *in* ALL *Places within three Miles* of the City, they have *none* AT ALL given them under this Act of Parliament. * V. ante pa. 389. 390. Rex v. Goddard Williams.

Now *Drury Lane*, appears and was proved to be the *Place* WHERE the preſent *Offence was committed*: Which is clearly within three Miles of the City of *London*; and therefore it is within the *Juriſdiction* given to the City by this Clauſe, although it is indeed *actually* ſituated within the *Liberty* of the Church of *Weſtminſter*. And conſequently, the Penalty belongs to the *City of London*; and not to the Church of *Weſtminſter*.

[*Vide* § 46. which gives the Penalty; *viz.* ⅓ to the King; ⅓ to the Proſecutor; and ⅓ to the City, Burrough, Town, or Lord or Lords of Liberties *where* the Offence ſhall be committed or done.] They cited 1 *Lutw.* 138. under this ſecond Objection.

3d. Objection. It follows, "that the *Venue* is wrong;" it being *laid in Middleſex*.

Mr. *Norton contra* for the Plaintiff, was going to anſwer the Objections: But was prevented by

LORD MANSFIELD.

1ſt. The Act is *not confined* to particular Sorts of Leather, nor to particular Perſons: It *extends to* ALL *red* Leather; and to EVERY Perſon. The *Preamble* indeed is *general*, and does *not* mean or intend to ſpecify and enumerate every *particular* Caſe. But what the Legiſlature had in View, in the making this Act, was "to *ſecure the* STAPLE "of Leather by this Search &c."

* P. 499. * And all the *other* Clauſes of this Act are general; and are NOT *confined* to "Perſons occupied in the Trade or Bu-"ſineſs of *cutting Leather*." *This* would not have remedied the Evil; or anſwered the *End* of the Act: For the Evil is juſt the ſame, if any *other* Perſons commit this Offence.

2dly. The EXTENSION *of the* JURISDICTION of the City of *London*, undoubtedly, can NOT ALTER *the* LOCALITY of the Place *where* the Offence is commited. All that the Act does, is enlarging the *Juriſdiction* of the City of *London*. Beſides, the Act gives *particular* Penalties for particular Offences: And this Penalty, in the 46th Section, is given "⅓ to the King; ⅓ to him or them that ſhall firſt "ſue &c; And ⅓ to the City, Borough, Town, or Lord or "Lords of Liberties, WHERE the Offence ſhall be *com-"mitted or done*."

He concluded with ſaying that it was an exceſſively plain Caſe.

In which Opinion

The Three JUDGES concurring, a RULE was made, "That the *Poſtea* be delivered to the PLAINTIFF."

Monday 13 Feb. 1756.

Rex *verſ.* Inhabitants of *Auſtrey*.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT CASES, No. 142. P. 441.

Rex

Rex *verſ.* Inhabitants of Cold Aſhton. * P. 502.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT CASES, N°. 143. pa. 444.

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* Rex *verſ.* Martha Gray. * P. 510.

THE Defendant ſtood indicted of a Nuſance in ſtopping up a Foot-Way leading through *Richmond-Park*.

* The preſent Queſtion was only, Whether the Trial (for which Notice had been regularly given by the Proſecutors, "to try it at the next *Surry*-Aſſizes,") ſhould be put off, or not. * P. 511.

The Cauſe alledged for putting it off, by the Counſel for the Defendant, (who profeſſed themſelves to be Counſel, in this particular Caſe, for the Crown,) was that there had been a LIBEL *publiſhed* relative to the Queſtion in Iſſue, *with Intention to influence* the Publick and the *Jury* who ſhould try the Cauſe.

The Fact was, That when the Cauſe came on to be tried at the *laſt* Summer Aſſizes, before Lord *Mansfield*, this Libel (juſt then publiſhed and diſtributed,) was produced in Court, and complained of in Court, as calculated to inſtruct the Witneſſes and influence the Jury.

Two of the *Principal Proſecutors*, then in Court, were by Affidavit charged with having *procured* the ſaid Libel to be written publiſhed and diſtributed. It purported, in the Title-Page, to be printed for and Publiſhed by *Shepheard*, the Brother of a Principal Proſecutor: And an Affidavit was read, proving Him the Publiſher, And that the Copy produced was bought from Him in his Shop, and that He "ſaid, Great Numbers had been ſent to the *Surry*-Aſſizes."

The next Day *One* of the ſaid Proſecutors *only* made an Affidavit to deny the Charge; but in *ſuch a Manner* that it rather fixed it, as much as the Silence of the Other did.

The

The Counſel for the Proſecution, as it did not appear to *what* Witneſſes or Jurors the Pamphlet had been conveyed, apprehending that ſuch Practices were not only a Contempt of the Court and high Miſdemeanor, but might invalidate any Verdict obtained before a proper Inquiry could be made into the Matter, deſired that the Trial might be poſtponed.

Which was conſented to, by the Counſel for the Defendant: And an Order was accordingly made, upon the Motion of one Side, conſented to by the Other.

Informations were afterwards moved for, and granted, againſt Some of the Perſons concerned in Printing and Publiſhing the ſaid Pamphlet; and were ready for Trial at the Sittings after this Term, in *Middleſex* and *London*.

* P. 512. * Mr. Attorney-General and the other Counſel for the Crown, moved, a few Days ago, to put off the intended Trial of the *Indictment againſt* the Defendant GRAY, TILL AFTER *the Trial* of *this* Information which had been filed *againſt the Publiſhers of this Libel*; or at leaſt to the next following Aſſizes to theſe now approaching *Lent*-Aſſizes; To the End that the Publiſhers of this Libel might be tried in the *Interim*, and receive Judgment, (if convicted:) Which, they ſaid, would *take off* the improper Influence which the Publication of it had occaſioned.

Which Motion being ſtrongly oppoſed by the Counſel for the Proſecution; The Court took Time, till this Day, to adviſe.

And now Lord MANSFIELD delivered his own and Mr. Juſt. DENISON's and Mr. Juſt. WILMOT's Opinions, (for He ſaid He did not know Mr. Juſt FOSTER's, who had juſt ſent Him a Letter to inform Him "That He could not "be here to Day;") which Opinion was, in ſhort, (though He gave it very much at large,) That the Trial of theſe Informations for Publiſhing the Libel, was NOT *ſo connected with* the Merits of the Queſtion to be tried upon the Indictment, (which was a mere Queſtion of *Civil Right*, though in the Form of a Criminal Proſecution,) as that the Trial of the Civil *Right* ought to be ſtayed till the Determination of the Information againſt theſe Publiſhers of the Libel.

At the Aſſizes, The Counſel for the Proſecution deſired the Trial might be put off; Which was conſented to, on the Part of the Defendant. If they had not, I ſhould have adjourned it Myſelf. But there is not the ſame Reaſon now.

now. For at *that* Time, it appeared that One, if not Two of the principal Profecutors attending the Aſſizes, had been induſtrious in diſperſing and ſending it about, to the Witneſſes and Jury, for very unjuſtifiable Purpoſes. But now * One of theſe principal Profecutors chiefly concerned in it, is dead, and was ſo even before the Motion for the Information; the † Other is NOT *now under the Charge* of being concerned, (whatever *Suſpicion* may remain upon him:) And the *only* Perſons fixed upon by the Affidavits, now actually under the Charge, are *mere Pamphlet-Sellers and Publiſhers*, of whom they were bought. And He could not, He ſaid, upon the beſt Conſideration that he could give it, at all diſcover or conceive how the Conviction or Acquittal of *them* of the mere FACT *of Publication of this Libel*, could ANY WAY *affect* the Merits of the Queſtion concerning the *Civil* Right; or how the Trial of the Point upon the Civil Right could be at all altered, by being brought on before, or after the Event of the Criminal Trial for publiſhing the Libel.

* Shepheard.

† Lewis.

* Indeed, *if that had been* the Caſe, As ſuppoſe there had been an Information againſt the Principal Profecutors of this Indictment for the Nuſance, for inſtructing and ſuborning Witneſſes, or for undue Endeavours to influence Jurors, *That* might have been a Reaſon for poſtponing the Cauſe till theſe Charges relative to the Conduct of the Parties were tried. But *that* is not this Caſe: And whether the Defendants to the Informations were or were not guilty of publiſhing this Libel, can no way affect the Merits of the Cauſe, or can any how be given in Evidence.

* P. 513.

Therefore the RULE muſt be DISCHARGED.

Rex *verſ.* Inhabitants of Mayfield.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto Edition of my SETTLEMENT-CASES, No. 144. pa. 513.

Fairley

Fairley *verſ.* Mc Connell.

MR. *Aſton* ſhewed Cauſe "why a *Procedendo* ſhould "not go, to the *Burrough-Court* of *Portſmouth*:" who inſiſted on a Right to proceed there, AFTER *a Habeas Corpus cum Cauſa*.

He, on the contrary, inſiſted That by the Proviſo in § 6. of the 21 *Jac.* 1. *c.* 23. ("to prevent Suits commenced in "inferior Courts, from being removed into ſuperior, unleſs "*&c.*") There ought to have been an *Utter-Barriſter* of 3 Years ſtanding, PRESENT at the Trial of the Cauſe: Whereas no ſuch Perſon was preſent at this Trial. For *want of which*, the Trial, He ſaid, was void; And the *Habeas Corpus* to remove the Cauſe, was well brought. In Proof of this He cited *Cro. Car.* 79. *Clapham*'s Caſe—(2d Reſolution) in Point—"That it is eſſential that an Utter-"Barriſter of 3 Years Standing, be preſent, either as "Judge, or Deputy-Judge." 3 *Mod.* 85. *Anonymous*. A like Reſolution proving the Neceſſity of an Utter-Barriſter's being preſent; Or elſe, that this Act, by Virtue of this Proviſo, does *not extend* to the Caſe.

Mr. *Yates contra*, for the *Procedendo*. This Qualification, of being Utter-Barriſter of 3 Years ſtanding *&c.* ONLY
* P. 515. **extends* to the Caſe of the Judge or Steward *Himſelf*; NOT to his *Aſſiſtant*. And Mr. *Serj. Stanniford* who *is* ſuch a Barriſter as is deſcribed in the Proviſo, is the *Judge* of the Court. So that the *Proviſo does not extend* to the preſent Caſe.

Mr. *Aſton* in Reply—But *He* was NOT *preſent*: The Cauſe was tried by Mr. *White*, an *Attorney*; who is his Deputy, and is not a Barriſter at all. And the Defendant relied upon the *Habeas Corpus* to remove the Cauſe out of this inferior Court; and therefore did not attempt to try the Merits, or make any Defence, *there*.

N. B. The PROVISO is, "That this Act (of 21 *Ja.* 1. "*c.* 23) ſhall *extend* ONLY *to* SUCH Courts of Re-"cord in Cities, Liberties, Towns Corporate, and "elſewhere, and for ſo long Time only, as there is "or ſhall be an Utter-Barriſter of 3 Years Standing "at the Bar, of one of the Four Inns of Court, that "is or ſhall be *Steward*, *Under-Steward* or *Deputy-*"*Steward*, *Town-Clerk*, or *Judge* or *Recorder* of the "ſame inferior Court; or that is or ſhall be from Time "to Time *Aſſiſtant* to ſuch Judge or Judges of ſuch in-"ferior Courts *as ſhall not be* Utter-Barriſters of ſuch "Standing,

" Standing, as is aforeſaid; AND THERE PRE-
" SENT; In which, ſuch Actions, Bill, Plaints, Suits
" or Cauſes, is or ſhall be brought, commenced, or
" depending; and *not of Counſel* in any Action,
" Suit or Cauſe then depending in the ſame inferior
" Court."

LORD MANSFIELD—The Judge, though he be ſuch a Barriſter, can be of no Uſe to the Court, unleſs *He* HIMSELF *be* THERE. The meaning of the Act is, That ſuch an Utter-Barriſter ought in all Events, *to be* PRESENT *at the Trial*,

Mr. Juſt. DENISON and Mr. Juſt. WILMOT—Certainly: *That* was the Meaning of the Act beyond Doubt. And *for* WANT *of this*, the Trial now in queſtion is void.

The RULE (to ſhew Cauſe "Why there ſhould not iſ-
" ſue a Writ of *Procedendo*, to be directed to the
" Mayor, Aldermen and Burgeſſes of the Burrough of
" *Portſmouth*;" And "Why the Defendant ſhould
" not pay to the Plaintiff the Coſts of this Appli-
" cation;") was

DISCHARGED.

* Rex *verſ.* Elizabeth Sarmon. * P. 516.

THE Court made no Sort of Difficulty to *quaſh an Indictment*, (though attempted, by two or three Counſel, to be ſupported) "For that the Defendant *for*
" *the Space of* FOUR *Hours and* MORE TOGETHER, on
" *every* of the ſeveral Days ſpecified, (which were the
" firſt Day of *January* 29 G. 2. and *divers other* Days and
" Times between that Day and the Day of taking the In-
" quiſition,) *with Force and Arms, &c.* at *London*, at the
" Pariſh of *St. Martin within Ludgate*, in the Ward of
" *Farringdon Without*, in *London*, aforeſaid, unlawfully in-
" juriouſly and wilfully did SET PLACE *and* KEEP *a*
" *certain* Perſon, (whoſe Name was yet unknown to the
" Jurors,) *in and upon the common and ancient Foot-Way* on
" the North-Side of the *Public Street* there ſituate, called
" *Ludgate-hill*; TO DELIVER *out certain* PRINTED
" BILLS OF HER OCCUPATION, to Perſons paſſing
" that Way; *which ſaid Perſon* ſo ſet placed and kept
" there, by her the ſaid *Elizabeth*, did, on the ſaid Days
" and Times, REMAIN IN AND UPON *the ſaid com-*

mon

" *mon Foot-Way* DURING *the ſeveral Spaces of Time aforeſaid,*
" DELIVERING AND DISTRIBUTING *printed Bills,*
" as aforeſaid; Whereby *the ſame Foot-Way,* at thoſe ſe-
" veral Days and times, *was greatly* IMPEDED *and* OB-
" STRUCTED: So THAT *the Liege Subjects* of our ſaid
" Lord the King, *there paſſing and reſiding, could* NOT
" SO FREELY *go paſs and repaſs in by or through the*
" SAME WAY, *as they ought and were uſed to do:* To the
" great Damage and *common* NUSANCE *of* all the ſaid
" Subjects, and againſt the Peace of our ſaid Lord the
" King his Crown and Dignity."

The Court held this to be a Matter NOT *indictable*; and *quaſhed the* INDICTMENT.

The End of *Hilary* Term 1758, 31 *Geo.* 2.

Eaſter

* Eaſter Term,

* P. 517.

31 Geo. 2. B. R. 1758.

Rex *verſ.* Richardſon

Wedneſday, 12th April 1758.

THIS was a *general* Demurrer, by the King's Coroner and Attorney, to the Defendant's Plea to an Information in Nature of a *Quo warranto* exhibited againſt *Thomas Richardſon*, to ſhew by what Authority he claimed to be one of the Portmen of the Town or Burrough of *Ipſwich*.

The Plea (in Subſtance) is, that *Ipſwich* is an ancient Burrough by Preſcription, prior to the Charter: That at the Time of granting it, there were, and long before had been 12 Burgeſſes called Portmen. Then it ſets forth the Letters Patent of Incorporation, dated 11 *Feb.* 17 *Car.* 2. which, after reciting that this Town or Burrough had been, for many Ages, a Corporation &c; firſt confirms the ſaid Incorporation and all their Liberties Free Cuſtoms Franchiſes &c. Then the ſaid Letters Patent name conſtitute and confirm the ſeveral Officers, and (amongſt the reſt) twelve Portmen. Then they go on to grant and confirm, "that "All *Elections* of the *Portmen* and of every of them, by "the Death OR REMOVAL of any of them or otherwiſe in "whatſoever Manner happening, ſhould from thenceforth "for ever be made and ought to be made *by the* OTHERS "*or* RESIDUE of the Portmen for the Time being, *or the* "*greater Part of* THEM."

Then thePlea ſets forth the Acceptance of the Letters Patent by the Corporation, and their conforming thereto, to the Time of the Plea.

The Plea goes on, and alledges a Cuſtom then and ſtill ſubſiſting, "that the Bailiffs Burgeſſes, and Commonalty "for the Time being, OR *ſo many of them as would be pre-* "*ſent*, have met and aſſembled and of Right ought to "meet and aſſemble together in the *Moot-hall* yearly and "every

* P. 518. * "every Year, at divers Times in the Year, *viz. Once* "*on the 8th of September* in every Year, for the Election "of Bailiffs, and for the conſulting about and tranſacting "of other lawful and neceſſary Affairs concerning the "Burrough and the good Rule and Government thereof; "and *again at Michaelmas* in every Year, for the tranſact- "ing of divers lawful and neceſſary Buſineſſes *&c.* And "*alſo at ſuch* OTHER *Time and Times* in the Year as to "the Bailiffs of the ſaid Town or Burrough for the Time "being hath ſeemed meet and neceſſary, *upon* DUE *Notice* "being previouſly given thereof, for the better ordering "Regulation and Government of the ſaid Town or Bur- "rough: At which ſaid Aſſembly, from Time to Time "had and held as aforeſaid, the Bailiffs of the ſaid Town "or Burrough for the Time being, during all the Time "aforeſaid, have of Right preſided, and have uſed and "been accuſtomed and ought to preſide; and *which ſaid* "*Aſſembly*, during all the Time laſt aforeſaid, hath been "and hath been called the GREAT *Court* of the ſaid "Town or Burrough.

Then the Plea further ſets forth another then and ſtill ſubſiſting Cuſtom and Method of *Electing* ſwearing and admitting the *Portmen, whenever* any Vacaney or Vacancies hath or have happened by the Death Reſignation *Diſcharge* or *Removal* of any Portman or Portmen of the ſame Town, or in any wiſe whatſoever; *viz.* "that *the* RESIDUE of the "Portmen, or the *greater Part of* THEM, have *within a* "REASONABLE AND CONVENIENT *Time* after the hap- "pening of ſuch Vacancy or Vacancies, *aſſembled* in the "Council-Chamber, for the *Election of another Portman* or "other Portmen; And, in the ſaid Room there, have elect- "ed and named, and of Right ought to elect and name, out "of the then Burgeſſes of the ſaid Town or Burrough then "reſident and inhabiting within it, ſuch other Perſon or "Perſons as the *ſaid then* RESIDUE of the Portmen afore- "ſaid, *or the greateſt Part of* THEM, have thought fit and "proper to be a Portman or Portmen of the ſaid Town, to "fill up ſuch Vacancy or Vacancies: And ſuch Perſon or "Perſons *ſo* elected and named to be a Portman or Portmen "of the ſaid Town or Burrough, and being reſident and "inhabiting in the ſame Town, hath and have, for all the "Time aforeſaid, been ſworn and admitted, and during all "that Time ought of Right to be ſworn and admitted into "the ſame Office or Offices; And every Perſon *ſo* elected "ſworn or admitted *&c.* and being reſident and inhabiting "*&c.* during all the Time aforeſaid, hath of Right enjoyed "had uſed and exerciſed, and during all that Time ought "of Right to have Uſe and Exerciſe, and ſtill of Right "ought to enjoy uſe have and exerciſe the ſaid Office of a "Portman of the ſaid Town or Burrough, and all the Li- "berties Privileges Rights and Franchiſes to that Office "belonging and appertaining, from the Time of his Ad- "miſſion thereto, until the Death Reſignation *Diſcharge* or "*Removal* of ſuch Portman."

The

* The Plea further ſhews, That every Portman of the ſaid Town or Burrough, during the Time of his being in that office, ought, according to the Cuſtom of the ſaid Town or Burrough, to be reſident and inhabitant within the ſame Town or Burrough or the Liberties thereof; and according to the Cuſtom of the ſaid Town or Burrough and BY THE DUTY *of his Office of Portman, ought to* ATTEND *and be* PRESENT *at every* GREAT *Court* of the ſaid Town or Burrough held or to be held in the *Moot-Hall* aforeſaid within the ſaid Town or Burrough, *To* ADVISE *and* ASSIST *the Bailiffs* of the ſaid Town or Burrough for the Time being, in the good Rule and Government of the ſame Town or Burrough. * P. 519.

It then alledges that on the 8th of *September* 1755, and for ſix Months and more next preceding that Day, He the ſaid *Thomas Richardſon* and one *John Gravenor* were Bailiffs of the ſaid Town or Burrough.

That on the ſame Day and Year, and for the Space of one whole Year then laſt paſt, and upwards, Sir *Richard Lloyd* Knight, *John Sparrowe*, *Samuel Kent*, *Humphrey Rant*, *Ellis Brand*, *Michael Thirkle* the Younger, *Goodchild Clarke*, *William Hammond*, *George Foſter Tuffnell*, and *James Wilder* were the then Portmen of the ſaid Town or Burrough.

That within the ſaid Space of that Year during which the ſaid Sir *Richard Lloyd &c.* were Portmen as aforeſaid, *divers Great Courts* of the ſame Town or Burrough, were holden *&c*; that is to ſay *One Great Court* of the ſaid Town or Burrough, was duly holden at the ſaid *Moot-Hall* of the ſaid Town, in and for the ſaid Burrough, on the 13th of *January* 1755; *One other Great Court* of the ſaid Town or Burrough was duly holden at the ſaid *Moot Hall &c.* on the 15th of *April* 1755; *One other*, on the 9th of *June* 1755; And *One Other*, on the 19th of *June* 1755; Before the Holding of which ſaid ſeveral Courts reſpectively, DUE NOTICE *had been* GIVEN *of the holding thereof reſpectively.*

That on the ſaid 8th of *September* 1755, they the ſaid *Thomas Richardſon* and *John Gravenor*, being then Bailiffs, and the above-named *James Wilder*, then one of the Portmen of the ſaid Town or Burrough as aforeſaid, and a great Number of the then Burgeſſes and Commonalty of the ſaid Town or Burrough, in due Manner, according to the Cuſtom of the ſaid Burrough, met and aſſembled together in the *Moot-Hall* aforeſaid within the ſaid Town or Burrough; and then and there held a *Great Court* of the ſame Town or Burrough, (*due Notice of the holding thereof* having there been previouſly given,) *for the Election of Bailiffs* of the ſaid Town or Burrough,

* P. 520 Burrough, and for the Tranſaction of divers other lawful and neceſſary Matters and Buſineſſes concerning the good Rule and Government of the ſame Town or Burrough.

That the ſaid Sir *Richard Lloyd*, *John Sparrowe*, *Samuel Kent*, *Humphrey Rant*, *Ellis Brand*, *Michael Thirkle*, *Goodchild Clark*, *William Hammond* and *George Foſter Tuffnell*, did *not nor did* ANY *of them* ATTEND *or* APPEAR *at the ſame Great Court* of the ſaid Town or Burrough, but WILFULLY ABSENTED *themſelves therefrom*; And that They and Every and Each of them WILFULLY *had abſented themſelves from the ſaid other Great Courts* of the ſaid Town or Burrough which had been ſo duly holden in the ſame Town or Burrough within the ſaid Space of One Year then laſt paſt as aforeſaid, and from *every* of thoſe Great Courts; And had *voluntarily neglected*, and every and Each of them *had voluntarily* NEGLECTED *to attend* at the ſaid Great Courts ſo holden as aforeſaid, *or at any of them*: And *thereby*, Each of them the ſaid Sir *Richard Lloyd &c*, and *G. F. Tuffnell neglected and omitted the Duty and Execution of his ſaid Office* of One of the Portmen of the ſaid Town or Burrough, and *thereby* DEPRIVED *the then Bailiffs Burgeſſes* and Commonalty of the ſaid Town or Burrough *aſſembled at the ſaid ſeveral Great Courts*, of that *Counſel Aid aſſiſtance* and *Advice* which *by the* DUTY *of his Office of Portman* of the ſaid Town or Burrough, and *according to the* OBLIGATION *of the* OATH *of Office by him taken* in that Behalf, He *ought* to have given; *To the great Hindrance and Delay of the* PUBLIC *Buſineſs of the ſaid Burrough*, To the *great Damage Diſappointment and Prejudice* of the Bailiffs Burgeſſes and Commonalty of the ſaid Burrough, and to the great Hindrance and in open Subverſion of the good Rule Government and Conſtitution of the ſaid Burrough.

That *thereupon, at the ſame Great Court* of the ſaid Town or Burrough holden on the ſaid 8th Day of *September* 1755, for the Purpoſes aforeſaid, (the ſaid Great Court having Notice of the Premiſſes,) It was in due Manner Ordered, by the ſaid then Bailiffs Burgeſſes and Commonalty of the ſaid Town or Burrough then met and aſſembled at that Great Court as aforeſaid, "That the ſaid Sir *Richard Lloyd*, "*John Sparrowe*, *Samuel Kent*, *Humphrey Rant*, *Ellis* "*Brand*, *Michael Thirkle*, *Goodchild Clarke*, *William Ham-* "*mond*, and *George Foſter Tuffnell*, and each of them re- "ſpectively, ſhould ſeverally and reſpectively HAVE NO- "TICE *of the Neglect of Duty charged upon each of them, and be* "*ſummoned to appear* at the then next Great Court of the "ſaid Town or Burrough, that is to ſay, in the Moot-Hall "aforeſaid, on *Monday* the 29th Day of the ſame *Septem-* "*ber*; ſeverally and reſpectively to *ſhew Cauſe*, (if they or "any of them could,) Why Each of them reſpectively "*ſhould not be* DISCHARGED *from his ſaid* OFFICE *of* PORT- "MAN FOR *his reſpective* NEGLECTS *aforeſaid*."

That

* That afterwards, and before the Holding of the ſaid * P. 521. then next Great Court of the ſame Town or Burrough, to wit on the 20th Day of the ſame *September* 1755, Each of them the ſaid Sir *Richard Lloyd*, *J. S. S. K. H. R. E. B. M. T. G. C. W. H.* and *G. F. T.* HAD NOTICE *of the ſaid Order* ſo made by the ſame Great Court, and of the *Charge alledged* againſt *Each* of them reſpectively, of his aforeſaid Neglects; and were then and there *ſeverally and reſpectively* SUMMONED, and *every and each* of them was then and there *in due Manner ſummoned* to attend and appear at the ſaid then next Great Court of the ſaid Town or Burrough to be holden in the Moot-Hall aforeſaid in the ſaid Town or Burrough on *Monday* the 29th Day of the ſame *September*, by the Bailiffs Burgeſſes and Commonalty of the ſaid Town or Burrough, and to ſhew Cauſe (if any of them could) why Each of them the ſaid Portmen, reſpectively ſhould not be diſcharged from his ſaid Office of Portman, for his reſpective Neglects, aforeſaid.

That afterwards, that is to ſay, on the ſame *Monday* the 29th Day of *September* in the ſaid Year of our Lord 1755, They the ſaid *Thomas Richardſon* and *John Gravenor*, being then and there Bailiffs of the ſaid Town or Burrough, and the ſaid *James Wilder* being then *One* of the Portmen of the ſaid Town or Burrough, And a great Number of the then Burgeſſes and Commonalty of the ſame Town or Burrough (due Notice having there been previouſly given in that Behalf,) did, in due Manner according to the Cuſtom of the ſaid Burrough, meet and aſſemble in Moot-Hall aforeſaid within the ſaid Town or Burrough, And then and there *held a Great Court* of the ſame Town or Burrough in and for the ſaid Town or Burrough; And the ſaid Sir *Richard Lloyd J. S. S. K. H. R. E. B. M. T. G. C. W. H.* and *G. F. T.* although they were then and there ſolemnly and ſeverally called for that Purpoſe, *did* NOT *nor did any of them* APPEAR *or* ATTEND *at that Court or* SHEW ANY CAUSE Why they and Each of them ſhould not be diſcharged from the ſaid Office of Portman of the ſaid Town or Burrough: But they and each of them did then and there *wholly make* DEFAULT *therein.*

That at the *ſame* Great Court *&c*, ſo holden as aforeſaid on the ſaid *Monday* the 29th of *September* 1755, A FURTHER *Day was given* by the ſame Great Court, to the ſaid Sir *Richard Lloyd &c*, reſpectively, *until the then next* Great Court of the ſaid Town or Burrough to be holden in and for the ſaid Town or Burrough at the Moot-Hall of the ſaid Town or Burrough on *Tueſday* the 14th Day of *October* then next enſuing, To ſhew Cauſe as aforeſaid: And it was then and there in due Manner Ordered by the ſame Great Court, "That the ſaid Sir *Richard Lloyd &c*, and every of "them *ſhould have Notice* and be ſeverally and reſpectively "*ſummoned to appear* at the ſaid then next Great Court

&c,

* P. 522. "* &c, to be holden &c, on the ſaid *Tueſday* the 14th Day of "*October* then next enſuing ſeverally and reſpectively to ſhew "Cauſe (if any of them could,) why they and Each of them "reſpectively ſhould not, *for the Cauſe aforeſaid* alledged "againſt Each of them reſpectively, be diſcharged from his "Office of Portman of the ſaid Town or Burrough *for his* "*Neglects* aforeſaid."

That afterwards, and before the Holding of the ſaid then next Great Court of the ſame Town or Burrough, to wit, on the 10th Day of the ſame *October* in the ſaid Year of our Lord 1755, They the ſaid Sir *Richard Lloyd &c*, and each of them reſpectively *had due Notice* of that Order, and of the Charge alledged againſt each of them reſpectively, of his aforeſaid Neglects; and were then and there ſeverally and reſpectively *ſummoned*, and every and each of them was then and there *in due Manner ſummoned to appear and attend* at the ſaid then next Great Court of the ſaid Town or Burrough to be holden in and for the ſaid Town or Burrough, on *Tueſday* the 14th Day of *October* then next enſuing, To ſhew Cauſe, (if any of them could,) why they and each of them reſpectively ſhould not, *for the Cauſe aforeſaid* alledged againſt each of them reſpectively, be diſcharged from his Office of a Portman of the ſaid Town or Burrough, *for his Neglects aforeſaid.*

That on the ſaid *Tueſday* the 14th of *October* aforeſaid, in the ſaid Year of our Lord 1755, *Lark Tarver* and *Thomas Bowell* were Bailiffs of the ſaid Town or Burrough; And that the aforeſaid Sir *Richard Lloyd &c*, And *James Wilder*, were the then *only* Portmen of the ſaid Town or Burrough.

That on the ſaid *Tueſday* the 14th Day of *October* aforeſaid, They the ſaid *Lark Tarver* and *Thomas Bowell*, then being Bailiffs of the ſaid Town or Burrough, and *the ſaid James* WILDER *then* ONE of *the Portmen* of the ſame Town or Burrough, and a great Number of the then Burgeſſes and Commonalty of the ſaid Town or Burrough (*due Notice* in that Behalf having there been previouſly given,) did, in due Manner according to the Cuſtom of the ſaid Burrough, meet and aſſemble in the Moot-Hall aforeſaid in the ſaid Town or Burrough, and then and there held a Great Court of the ſame Town or Burrough, for the Tranſaction of divers lawful Affairs concerning the Good Rule and Government of the ſaid Town or Burrough.

That at the ſame Great Court, &c, ſo holden as aforeſaid on *Tueſday* the 14th of *October* 1755, The aforeſaid Sir *Richard Lloyd &c*, were ſeverally and ſolemnly called, and every and each of them was ſeverally and ſolemnly called to appear and to ſhew Cauſe at that Court, (if any of them could,) why each of them reſpectively ſhould

* ſhould not, for his Neglect of Duty aforeſaid charged and alledged againſt each of them reſpectively, be diſcharged and removed from his ſaid Office of Portman of the ſaid Town or Burrough. That they the ſaid Sir *Richard Lloyd*, *&c*, being ſo reſpectively and ſolemnly called as laſt aforeſaid, DID NOT *nor did any of* THEM ATTEND *or appear or ſhew any Cauſe* whatſoever, at that Court, why they or any of them ſhould not be diſcharged and removed from his ſaid Office of Portman of the ſaid Town or Burrough: But they Every and Each of them did then and there *wholly make Default* therein; and *neither* they nor any of them, nor any Perſon on the Behalf of them or any of them, did then require any future Day or Time to be allowed to them or any of them, to ſhew Cauſe as aforeſaid. WHEREUPON, the ſaid *Lark Tarver* and *Thomas Bowell*, then being Bailiffs of the ſaid Town or Burrough, And the Reſt of the ſaid Burgeſſes and Commonalty of the ſaid Town or Burrough, then ſo met and aſſembled, and holding the ſaid Great Court of the ſaid Town or Burrough as aforeſaid on the ſaid 14th Day of *October* in the Year laſt mentioned, having taken the Premiſſes into their Conſideration, and having fully and deliberately weighed the ſame; The ſaid COURT did then and there ORDER "That Each of them the ſaid Sir *Richard* "*Lloyd*, *J. S. S K. H. R. E. B. M. T. G. C W. H.* and "*G. F. T. ſhould be* DISMISSED DISCHARGED *and* RE- "MOVED from his *Office of a Portman* of the ſaid Town or "Burrough: And Each of them reſpectively *was* then and "there, by the ſaid Court, FOR *his ſaid Neglect of Duty*, "DULY *diſcharged and removed* from his Place and Office of "Portman of the ſaid Town or Burrough; and Each of "them hath ever ſince remained and been, and yet is diſ- "charged and removed therefrom." * P. 523.

That the aforeſaid Sir *R. L. J. S. S. K H. R. E. B. M. T. G. C. W. H.* and *G. F T.* being ſo reſpectively diſcharged and removed from their ſaid reſpective Offices as aforeſaid, He the ſaid *James Wilder*, afterwards on the ſame Day and Year, and from the Time of their ſaid reſpective Diſcharges and Removal UNTIL AND AT *the Time of the Election of* OTHER *Portmen* of the ſaid Town or Burrough herein after mentioned, remained and was a Portman of the ſaid Town or Burrough; and then, and during all that Time, was *the* ONLY *Portman* of the ſame Town or Burrough.

That afterwards, on the ſaid *Tueſday* the 14th Day of *October* aforeſaid in the Year laſt mentioned, the ſaid *James Wilder*, *being* THEN *the* ONLY *Portman* of the ſaid Town or Burrough, *retired* and went into the Room called the Council-Chamber, in the Moot-Hall aforeſaid in the ſaid Town or Burrough, *in Order to elect Other* Burgeſſes of the ſame Town or Burrough, reſident and inhabiting within the ſaid Town or Burrough, to be *Portmen* of the ſaid Town or Burrough *in the Places* of Portmen of the ſaid Town or Burrough VACANT *as aforeſaid*: And *did* then, in the ſaid

* P. 524. * Room there, *in due manner* ELECT HIM *the ſaid* THOMAS RICHARDSON (being then and there a Burgeſs of the ſame Town or Burrough, inhabiting and reſident within the ſame Town or Burrough, and a fit and proper Perſon to be a Portman thereof,) to be *One of the Portmen* of the ſaid Town or Burrough, *in the Place of* One of the Portmen of the ſaid Town or Burrough THEN VACANT *as aforeſaid.*

That he the ſaid *Thomas Richardſon*, being *ſo elected* to be a *Portman* of the ſaid Town or Burrough, afterwards and before he was admitted to or took upon him the Execution of that Office, that is to ſay, at the ſame Great Court of the ſaid Town or Burrough, in the Moot-Hall aforeſaid, on the ſame *Tueſday* the 14th Day of *October* in the Year laſt aforeſaid, at the ſame Great Court of the ſaid Town or Burrough in the Town-Hall aforeſaid, did then and there BEFORE *the* ſaid *Lark Tarver* and *Thomas Boxwell* then BAILIFFS of the ſaid Town or Burrough, in *due Manner* and *according to the Uſage and Cuſtom* of the ſaid Burrough, *take his Corporal Oath for the faithful and due Execution of the ſaid Office* of a Portman of the ſaid Town or Burrough in all Things concerning the ſame *and* ALL OTHER *Oaths then required by Law in that Behalf*: And thereupon, He the ſaid *Thomas Richardſon* was then and there, at the ſame Great Court, in due Manner admitted into the ſaid Office of a Portman of the ſaid Town or Burrough. And thereupon, and by Virtue thereof, He the ſaid *Thomas Richardſon*, afterwards, that is to ſay, on the ſaid 14th Day of *October* 1755, and continually from thence until and at the Time of exhibiting the Information, was and ſtill is a *Portman* of the ſaid Town or Burrough.

And by that Warrant *&c*, *&c*.

The King's Coroner and Attorney demurs *generally*: And the Defendant joins in Demurrer.

This Caſe was three Times argued.

The *General* Queſtion was, "Whether the Defendant has "ſhewn a *ſufficient Title* to the Office:" Which general Queſtion was divided into two *ſubordinate* Ones; *viz.*

1ſt. Whether the Nine Portmen had been *well and duly* REMOVED; And (admitting that they were ſo,)

2dly. Whether the *Defendant was well* CHOSEN.

1ſt Objection to the Removal. Firſt—The Counſel for the Crown urged, That the Perſons amoving had *no* POWER *to amove*. For a Corporation have no

* no ſuch Power inherently or *incidentally:* And none is, * P. 525.
in the preſent Caſe, either given to this Corporation by Charter, or claimed by Preſcription.

They cited *Magna Charta*, *c.* 29 "*Nullus liber homo diſ-*
"*ſeiſietur de libero tenemento ſuo, niſi per legale judicium pari-*
"*um ſuorum, vel per legem terræ.*" *James Bagg*'s Caſe, 11 *Co.* 93 to 99. 1 *Ro. Rep.* 224, 225. S. C. and S. P. The Crown may, by Writ, diſcharge ſome Officers, after Conviction. See Sir *Robert Sawyer*'s Argument on the *Quo Warranto* againſt *London*, *fo.* 22. *State Trials Vol.* 4. *fo.* 810. S. C. Where Sir *Robert* mentions the Caſe of a Coroner: *F. N. B. New Edit.* 381. *Old. Edit.* 163. *Writ de Coronatore eligendo vel exonerando. Regiſter* 177. 178. *Writ de Coronatore eligendo; & de Viridario eligendo. F. N. B. New Edit.* 383. *Old Edit.* 164. *Writ de electione Viridariorum Foreſtæ. Dyer* 333. *Paſch.* 16 *Eliz. pl.* 28. which was a Reſtoration by Writ of a Citizen of *London*, who had been diſfranchiſed.

Theſe Authorities they cited, to illuſtrate and deduce the Poſition "That in Conſequence of a *Conviction*, Writs "ſhall iſſue out of the *King*'s Courts, where the Conviction "is;" and to ſhew "that the Power is originally in the "*Crown.*"

In *Yates*'s Caſe, *Style* 477, 480. it is ſaid "There muſt "be a cuſtom or a Statute to warrant a Diſfranchiſement." 1 *Ld. Raym.* 391. *Rex* v. *Mayor of Coventry*, *M.* 10 *W.* 3. (2d Point,) The Court held that the Corporation ought to ſhew a Power, either by cuſtom or under their Letters Patent. 2 *Ld. Raym.* 1564, 1565, 1566. *M.* 3 *G.* 2. *Rex* v. *Mayor &c*, of *Doncaſter*, recognizes the Authorities of *Bagg*'s Caſe, and *Yates*'s Caſe, "That a Freeman ſhall not "be removed, but by Charter or Preſcription." That Return was quaſhed; and a peremptory *Mandamus* iſſued. And *M.* 29 *G.* 2. *B. R. Rex* v. *Ponſonby* was agreeable to this.

The only *Dictum* to the contrary of this Doctrine, is in 2 *Strange* 819, 820. Lord *Bruce*'s Caſe: where it is ſaid "that the *Modern* Opinion has been, that a Power of Amo-"tion is *incident* to the Corporation." But this Report ought to carry but little Weight: For *other* Accounts of that Caſe *differ* from it; And NO ſuch *modern Opinion* as there hinted at, does any where appear.

Second Objection (under the firſt Point.) 2d Objection to the Removal.

Here was NO *ſufficient* CAUSE of Removal of theſe 9 Portmen.

Their NON-ATTENDANCE was *no Breach* of their Duty ſo as to occaſion a *Forfeiture*. 1 *Hawk P. C.* 168. ſays that the Notion of Forfeiture by bare Non-Uſer is not well warranted by the Authority cited in Maintenance of it.

* P. 526. * This Duty, "of attending to adviſe and aſſiſt the Bailiffs at the Great Courts," is NOT *conſtant and continual*; but OCCASIONAL *only*, and when they receive *Notice* to do ſo: They are not obliged to attend the *ordinary* and *common* Buſineſs of theſe Great Courts And it is not here alledged, "that any Counſel, Aid, Aſſiſtance, or Advice was *wanting*." Indeed the Plea "concludes that this was to the "Damage and Prejudice of the Corporation, and their "Hindrance &c.

But there is *no ſpecial Damage* laid: And the ſtating a *General* Damage to the Corporation is not enough; without ſhewing a *particular* Prejudice to them. 1 *Inſt* 233. *b.* is expreſsly ſo. *

* As to private Offices: Not as to public, which concern the Adminiſtration of Juſtice or the Common-Wealth.

A Burgeſs's Non-Attendance at Seſſions, is no Cauſe ſufficient for a Removal of him. *Regina* v. *Mayor and Burgeſſes of Pomfret*, *M.* 11 *Ann*, in *Lucas's Report* 107. is expreſsly ſo reſolved.

But even admitting they had this Power of Removal; Yet, it ought to be for *ſuch* an Offence as was *againſt their Oath of Office*: and conſequently, *this Oath of Office* ought to be *ſet forth*. *Style* 477, 478. 3 Ld. *Raym.* 1233. in Serjeant *Whitaker*'s Caſe—*Regina* v. *Ballivos, Burgenſes &c. de Gippo:* There the Oath *is ſet forth*. Here it is not.

3d Objection to the Removal.

Third Objection (under the firſt Point.) This is not a Removal *by the* WHOLE *Body*, at a *Corporate Aſſembly*; but by a particular *Court*. In *Carthew* 172. Sir *Peter Rich* v. *Pilkington*, the Court of Mayor and Aldermen was holden *not* to be a Corporate Aſſembly; but a *Court*. So here, this *Great Court* was only a *mixt* Aſſembly; and *not* the Mayor Burgeſſes and Commonalty.

4th. Objection to the Removal.

Fourth Objection (under the firſt Point.) The Removal is NOT *under their Common Seal*. 1 *Salk.* 192, The Mayor of *Thetford*'s Caſe is in Point, "That a Corporation can not "do an Act in *Pais*, without their Common Seal." 13 *H.* 8. 12 *Plowd.* 91 *b.* 92. *a.* 2 *Saund.* 305. * 3 *Lev. Manby* v. *Long et al.* § 1 *Ventr.* 47. *Horn* v. *Ivy* 1. *Mod.* 18. S. C. ‡ In 1 *Ventr.* 355. *Haddock*'s Caſe, The Words are, "If the "Power to remove be at their Will and Pleaſure, this Will "*muſt* be expreſſed *under their Common Seal:* But in a *Re*"*turn to a Mandamus*, *Debito modo amotus* may ſuffice." There is a Note, at the Bottom of the *Colcheſter* Caſe in 1 *Peere Wms.* 596, "That the Method of diſfranchiſing a "Corporator, (in order to examine Him as a Witneſs,) is "by an Information in the nature of a *Quo warranto* againſt "the Member; who confeſſes the Information: On which, "there is a *Judgment* to diſfranchiſe him." The preſent Caſe is NOT *like* to a *Return* to a *Mandamus*; where the mere Return of his being "*debito modo amotus*" is ſufficient: *Here*,

* (On the 1ſt Exception to the Plea.) § (2d. Exception to the Avowry) ‡ All theſe laſt Caſes do not authoritatively prove the Poſition not being the Point reſolved.

* *Here*, it ought to be *ſo pleaded*; this being a *Plea* to an Information: Which Plea ought to be taken againſt the Pleader. * P. 527.

Fifth Objection (under the firſt Point) was to the Want of PERSONAL *Notice* being given to the 9 removed Portmen, to attend the five Great Courts firſt mentioned in the Plea;" (for the Non-Attending whereof, they were afterwards removed.) 5th Objection to the Removal.

This Objection was firſt ſtarted by Lord *Mansfield*; who obſerved that for the Meetings aſſembled for doing Corporate Acts, A *Summons* (of *ſome ſort or other*) is neceſſary; And that *here*, the Offence itſelf turns upon Abſences from ſeveral Courts, *not* holden (except one of them) *upon* STATED *Days*, during the Period of about a Year: Yet *no* PERSONAL *Notice* to theſe Portmen is alledged by the Plea; but only, in general "that DUE *Notice* was given of the "holding thereof reſpectively:" ſo that it does *not appear* that they had *any Reaſon to think of any* PARTICULAR *or* SPECIAL *Buſineſs*. And *if ſo*, the particular Notice afterwards given them, "to ſhew Cauſe why they ſhould not be diſ-"franchiſed," will not affect them: For *that* is quite a ſubſequent diſtinct Tranſaction.

Therefore he offered to hear a further Argument on this ſingle Head if the Parties deſired it. Which they did: And this Objection was argued by itſelf.

The Counſel for the Crown *alſo* objected to the Notice given to theſe Portmen, of the Courts at which they were to have attended *to ſhew Cauſe* why they ſhould not be diſfranchiſed.

1ſt. They argued that it was *not* their Duty to have attended *at* ALL *Great Courts*, upon GENERAL *Notice* of them, WITHOUT PARTICULAR *and* PERSONAL *Summons*. For without ſuch *perſonal* Notice, they could not be guilty of ſuch a Lacheſſe as would be a Ground for a Forfeiture of their Office.

2dly. They inſiſted alſo that PARTICULAR and PERSONAL *Notice* ought to have been given them, of the *Charge*, and of the *Intention to diſfranchiſe*. 1 *Salk.* 214, *Nurſe* v. *Framton*. 8 *Rep.* 93, *Fraunces*'s Caſe; (3d. Reſolution.) And although it is alledged, "that EACH of them *reſpectively* "HAD *Notice*;" * yet this was *not enough*: But a *particular* and *ſpecific* Summons ought to be ſet forth. And they cited *Style* 446, 452. The Protector and the Town of *Colcheſter*, *Bernardiſton* the Recorder's Caſe. 4 *Mod.* 37, *Glide*'s Caſe. Caſes *temp. W.* 3. *fo.* 29. S. C. *Bagg*'s Caſe, 11 *Rep.* 99. *a*. And it is likewiſe ſo in *Actions*. *Fletcher* v. *Ingram*, laſt cited Book, *fo.* 87, 88, (v. Caſes *temp. W.* 3.) was a Replevin: And "*Notitiam habuit*" was holden too general, * V. poſt. 540.

1 Ld.

* P. 528. * 1 Ld. *Raym.* 225, 226. *Rex* v. *Chalke* upon a *Mandamus* to reſtore an Alderman, *per Holt*, "A Summons is neceſſa-"ry, that the Perſon charged may be *prepared* to make his "Defence." And this ought to be *perſonal* And it muſt be given by the proper Perſon. 6 *Rep.* 29. *a. b Green*'s Caſe: Where no Lapſe incurred for want of its being given in Certainty and explicit Particularity, and by the proper Perſon too.

The 1ſt Point.

Now the Words in the *preſent Allegation* "that each of "them *had* Notice," may be *true*; *though* they had no *proper*, *regular*, and *perſonal* Notice.

Second Point (*viz.* Second ſubordinate Queſtion.)

The Defendant has NOT *been* DULY ELECTED, and *ſworn*.

1ſt Objection to Defendant's Election.

1ſt. For the Election ought to be by the *Reſidue*; And "*Reſidue*" is a *plural* Term, and imports "*the others*:" Whereas here was only ONE SINGLE Portman left, And He *alone* elected the Defendant into this Office.

The Cuſtom requires "the *Portmen* to *aſſemble*:" Which Expreſſion neceſſarily imports ſome *Number* of them, at leaſt more than *One*; For One alone can never be ſaid to *aſſemble*. And all Charters ought to be taken according to the Cuſtom ſubſiſting at the Time of granting them. 2 *Inſt.* 282. And here they have been reduced to One, not by the Act of Providence, but by the voluntary Act of the Corporation themſelves.

2d Objection to Defendant's Election.

2dly. The Cuſtom alſo requires a *reaſonable and convenient Time*, "between the happening of the Vacancy, and "the Election of a new Portman." Whereas this Election Admiſſion and Swearing of the Defendant to be One of the Portmen in the Place of One of thoſe removed, were all *immediate*.

3d Objection to Defendant's Election.

3dly. Beſides, He ought to have been elected into the *Place* of ſome *particular* Portman; not in *general*, "into "the Place of *One* of them then vacant."

4th Objection to Defendant's Election and Swearing.

4hly. The plea does not ſufficiently particularize the Oath of Office, (vide *Style* 478;) nor alledge that the Perſons who *adminiſtered* the Oaths of the Defendant, (*viz.* the Bailiffs,) "*had ſuch* POWER *to adminiſter them*." It is only "averred That He took them before them in due Man-"ner and according to the Cuſtom." 1 *Strange* 539. *Rex* v. *Decan. et Capitul. Dublin Per Eyre* Juſtice, "In the Caſe "of Corporations, where the *Charter doth not impower* any "Body to give the Oath, they are forced to get a *Dedimus* "out of Chancery." *M.* 8. *G.* 2. *B. R. Rex* v. *Gibbon*, a Freeman.

*Freeman of *New Romney*; on a motion for a new Trial: * P. 529.
per Ld. *Hardwicke* "The Defendant, when he comes to "make a Title againſt the Crown, upon an Information in "nature of a *Quo warranto*, muſt make a *complete* Title to "the Office; and muſt ſhew a RIGHT of Swearing:" And his Lordſhip expreſsly added, "Shewing that he was ſworn "in due Manner and Form, *alone* is *not* ſufficient." Now here, he has *not* ſhewn "That the *Bailiffs* had a *Right* to "adminiſter the Oath."

The Counſel for the DEFENDANT Firſt obſerved that a PLEA is to be taken to a *common* Intent: Tis *not* like a *Mandamus to reſtore*; which muſt be taken *more ſtrictly*. Ex parte Def.

It appears, they ſaid, upon this plea, that there was *in Fact* a *Removal* of former Portmen; a *Vacancy* occaſioned thereby; and an *Election* of the Defendant into the Office, upon *that* Vacancy. The POWER *to remove*, is to be tried in *another* Method; at leaſt, more properly than by *this* Method: However, the Defendant is content to have the Merits determined in *this* or *any* Method.

Having premiſed thus much in general.—

1ſt. They urged that this Power of Removal is *implied* and *inherent* and INCIDENTAL *to the Conſtitution* of a Corporation. Anſwer to 1ſt Objection to the Removal.

The *Law* gives *whatever is neceſſary* to the Enjoyment of a Grant. Upon this Principle, is founded the *Power of making By-Laws* by Corporations: Much more, muſt they have Power inherent in them to exerciſe *Acts* ESSENTIAL *to their Exiſtence and Preſervation.*

The Power of *Amotion* is one of theſe; and is NOT *limited* to Caſes where the Party has been *previouſly* CONVICTED. Their Power of Amotion is the *ſame, after* Conviction, as *before*; neither greater, nor leſs: The *Conviction working no* CHANGE, either upon the Charter or preſcription.

Conviction is not a true Criterion of Guilt. For atrocious Crimes are not purged, with reſpect to the Corporation, by a *Pardon before Conviction*; (which the Crown may grant, if they pleaſe:) Or the Offender may run away; and *thereby avoid being convicted* at all.

Such Amotion can not be contrary to *Magna Charta*. For a Man *may* certainly be removed from his *Freehold if* he can be ſo by the *Law of the Land* So that there is no Argument to be drawn from *Magna Charta*, as to this Queſtion.

If a Corporation have no inherent Power to diſfranchiſe, How can they do it even *upon Requeſt* of the Corporator himſelf? Yet that was *Tidderly*'s * Caſe.

*V. 1 Siderf. 14.

But

* P. 530. * But *this* is NOT *a Diſfranchiſement* of a *Freeman*; but only a Diſplacing an *Officer* from an OFFICE, leaving him STILL *a Freeman.* And ſurely, *this mere* DISPLACING *from an Office* can *never demand a previous Conviction.*

Suppoſe an Officer becomes, by the Viſitation of Providence *inſane, blind*, or otherwiſe *incapable to execute his Office*; may not He be removed from ſuch Office? Ours is not an arbitrary Removal *ad libitum*; but a Removal for *good Cauſe.*

The Caſe of the Corporation of *Doncaſter*, in 2 Ld. *Raym.* 1564. (on a *Mandamus* to reſtore *Scott*, to be a Capital Burgeſs,) makes the *Diſtinction* between * turning out from an *Office*, and *diſfranchiſing.*

* At pa. 1566. indeed the Court obſerve "that the Charge did not affect him AS a Capital Bur-" geſs, but only as Chamberlain."

Lord *Bruce*'s Caſe in 2 *Strange* 819. is an Authority for us: For it ſays expreſsly, "that the *Modern Opinion* has "been that a Power of Amotion is incident to a Corporati-"on; though *Bagg*'s Caſe ſeems contrary." So in the Caſe of *Rex* v. *Flimpton temp.* Ld. *Hardwicke.* † And from the nature of the Thing, it *muſt be inherent* in the Corporation.

† Qu. What Caſe or when § V. poſt 533 or 534.

Beſides, here *is* an IMPLIED Power to remove, *by the Cuſtom.* For it is "to go to Election &c. wherever any Va-"cancy happens by *Removal &c.* of any Portman or Port-"men:" Which implies that the Corporation muſt have a *Power to amove.*

In the Caſe of Mr. *Fetherſtonhaugh*, *Rex* v. *Mayor* of *Newcaſtle upon Tyne*, *Mich.* 1747. 21 G. 2. *B. R.* the Court would not grant a peremptory *Mandamus* to reſtore Him; though the *Common Counſel* who removed him, had no Power in *them* to remove, but that Power muſt have been in *the Body at Large*, if it exiſted at all. However, here, the Removal is by the Body at large.

In the Caſe of *Rex* v. *Tiderley*, 1 *Siderf.* 14. It appears that the Ld. Ch. Baron *Hale* thought that Corporations *had* this Power, "to remove for good Cauſe;" AS Corporations, and *incidentally.*

It has been ſaid, "that, after Conviction, the Corporati-"on may have a *Writ from the Crown* to remove the Of-"fender." But this is a *Dangerous Doctrine*," that Corporators may be removed *by Writ from the Crown.*

As to the Caſes cited—Some of them relate to Coroners, Verderors &c; which are not applicable to Corporators.

Bagg's Caſe was upon a *Mandamus* to reſtore: And there was no *ſufficient Cauſe* of Removing him from his *Franchiſe.*

All

* All the reſt of the Caſe is *extrajudicial:* And the latter Part of it does not appear in Ld. *Roll*'s Report of it. So that, probably, it was *only* the *Reporter*'s own Opinion; and *not* ſaid by the *Court*. * P. 531.

And if a Corporation has inherent Power to remove, the Citation from *Magna Charta* does not oppugn it: Becauſe, in ſuch Caſe, it is "*per legem terræ*."

Style 478. was the Caſe of a *Freeman diſfranchiſed*; *not* an *Officer only removed* from his particular *Office*.

As to 1 *Ld. Raym.* 391, *Rex* v. *Mayor of Coventry*, *It* was a *Mandamus to reſtore*: And the *Cauſe* returned was holden * inſufficient.

* Yet ſtill it ſeems to be an authority: For the Court held "that they ought to have ſhewn either Cuſtom or Grant to remove."

As to 2 *Ld. Raym.* 1564, the Diſtinction abovementioned is expreſsly taken: And the Cauſe returned was holden ‡ inſufficient.

‡ Yet it is an authority in Point, in expreſs Terms, "that a Freeman ſhall not be removed by a Corporation, unleſs by virtue of a Charter or Preſcription."

As to the 2d Objection (under the firſt Point,) concerning the CAUSE of Amotion of the 9 Portmen— Anſwer to 2d Objection to the removal.

It appears to be a Cauſe fully ſufficient: For they had *neglected the Duty* of their Office, even *after Notice*. 1 *Inſt.* 233. *a.* proves this to be a Forfeiture of Office: For Lord *Coke* there expreſsly ſays "that *Non-Uſer* of Public Offices "is, of it ‖ ſelf a Cauſe of Forfeiture." And in the *Nature of the Thing*, it was ſo in the preſent Caſe. The Corporation have a RIGHT *to their Attendance*: And the *Right* and the *Obligation* ought to be *reciprocal*. ‖ V. ante. pa. 526. in Margine.

And how is it poſſible to aſſign a *ſpecial* Damage, where ſeveral Officers are *equally* obliged and *equally* negligent? However it *is* charged to be "*to the Damage and Prejudice* "of the Corporation."

It is a tacit Condition, that *Neglect of Duty* is a *ſufficient Cauſe* of Diſfranchiſement. *Bagg*'s Caſe 98. *a.* In 2 *Ld. Raym.* 1275. *Regina* v. *Truebody*, Who left the Burrough and lived out of it ſeveral Years, and *neglected Attendance* at the public Aſſemblies &c. This was holden a good Cauſe of Diſfranchiſement. In 4 *Mod.* 33. *Glide*'s Caſe, The whole Court agreed in this Opinion, "that an Alderman's "deſerting his Office was a good Cauſe of Diſfranchiſe-"ment." And *Holt* ſaid "So was abſenting himſelf from "the Council, in the very nature of the Thing." In *Carthew* 227. *Vaughan* v. *Lewis*, Ld. Ch. J. *Holt* was of Opinion, "That the not inhabiting *infrà* the Burrough &c, "was a good Cauſe to remove a Member."

In

* P. 532. * In the Caſe of *Rex* v. *Ponſonby*, it did not appear "That there *was* any *Non*-Attendance:" It only appeared "That they lived out of the Burrough."

And this wilful Abſence and Neglect of the 9 removed Portmen could not but be contrary to their Oath of Office too; though their *Oath of Office* is only mentioned *conſequentially*, in ſetting forth their Offence in the Plea.

Anſwer to 3d. Objection to the Removal. As to the 3d Objection under the firſt Point—It is objected "that this was *not a Corporate* Meeting." But it clearly was ſo: The Meeting conſiſted of *all the Integral Parts* of the Corporation; And the Portmen muſt be Freemen. It was not neceſſary to *ſpecify the Names* of the Corporators who were preſent. Theſe Portmen were removed at a Corporate Aſſembly, met to do Corporate Acts; And upon a *Contumacious Refuſal to attend and ſhew Cauſe* why they ſhould not be amoved.

Anſwer to 4th Objection to the Removal. 4thly, It is Objected, "that it was *not under the Common Seal.*"

As to which, 1ſt. That was *not neceſſary*: And 2dly, It is done *upon Record*; which is of *as high* a Nature.

And Members are, in every Day's Experience, amoved without any *Judgment*.

Anſwer to 5th Objection to the Removal. As to the Want of *Perſonal* Notice, *viz.* "Whether the "Abſence of theſe Portmen, whoſe *Preſence was* NOT *particularly neceſſary*, and who had *no particular* Notice of "any *ſpecial* Buſineſs, or any *Reaſon to ſuſpect* any particular and ſpecial Buſineſs to be done at theſe Courts, made "a Forfeiture, or was a ſufficient Ground of Amotion."—

They cited 9 *Co.* 50. *a.* in the Earl of *Salop*'s Caſe. Non-Uſer or Non-Attendance is a Forfeiture of ſuch Offices as ought to be attended without Demand or Requeſt.

2 *Ld Raym.* 1237. Serj. *Whitaker*'s Caſe. It was holden "that Non-Attendance was a Cauſe of Forfeiture: And he "was bound to attend, *at his Peril*, being a *public* Office "concerning the adminiſtration of Juſtice."

It is their Duty, as much as if they had actually covenanted to do it. And it appears by *Palmer* 332. *Biſhop of Rocheſter* v. *Young* "That a Covenantor ſhall *take* Notice; "and there is *no Need of* perſonal Notice." And this Notice is EQUIVALENT *to perſonal Notice.*

For

* For it is reaſonable to *preſume* that they were *reſident* in the Corporation. *Carthew* 227, 229, *Vaughan* v. *Lewis*, (the laſt Point) Ld. Ch. J. *Holt* held "That the not inha-"biting within the Burrough, ought to have been returned "as Special Matter." 5 *Mod.* 438, 442. *Vanacker*'s Caſe * —*Per Holt* Ch. J. "Every Member of a Corporation, "though abſent, is *Suppoſed* in Law to be there." 2 *Ro.* 136. Title *Notice*—Commoners are obliged to TAKE Notice of Ordinances made by the Homage under a Cuſtom. *Cro. Car.* 497. S. C. *James* v. *Tutney*. There, it was, by the Cuſtom, the Duty of all the Commoners, to appear at the Court. So here it is ſtated to be the Duty of theſe Portmen, to be reſident. And *Non-Reſidence* ALONE is a Cauſe of Forfeiture. * P. 533. * 4th Objection.

And the Frequency of Corruption of the original Inſtitution is a good Reaſon for reforming.

Their contumacious Diſobedience to the ſummons to ſhew Cauſe why they ſhould not be diſfranchiſed, ſhews their former Neglects to be wilful. They abſented themſelves 5 ſucceſſive Courts; though *only One other* Portman was left.

An Officer *refuſing to come when demanded*, forfeits his Office. *Bro. Forfeiture de terre, pl.* 61, 115.

And "*due Notice*" is alledged; Which is *confeſſed* by the Demurrer.

Second Point—The Defendant was *duly and legally* ELECTED, and ſworn.

Indeed, *if* he was not, the *Corporation is gone*: And therefore the Court will *endeavour to ſave it*, rather than let it be deſtroyed. And ſo they did, in the late Caſe of the Corporation of *Carmarthen*. *P.* 1755. 29 *G.* 2. *B. R.*

1ſt. The Word "*Reſidue*" only imports *what is left*; and does *not* neceſſarily imply Plurality. *Wilder was* "*the* RE-"SIDUE." Conſequently, he could continue the Corporation. Anſwer to 1ſt Objection to Defendant's Election.

The Court will conſtrue theſe Words favourably, *Regina* v. *J. S. Burgeſs of the Deviſes*, 7 *Ann.* in *Hilary* Term, was ſuch a Conſtruction. And ſo here, Death or Amotion might reduce the Number to Two or even to One: In either of which Caſes, there might be a Want of Majority amongſt them. So that the Court will make ſuch a Conſtruction as to ſupport the Charter.

2dly.

* P. 534. Anſwer to 2d Objection to Defendant's Election.

* 2dly. As to the *Time*.—The ſooner it was done, the better: And eſpecially as there was only One Portman left. If he had died, the Corporation had been diſſolved. They had a Right to fill up the Vacancy *immediately*.

Anſwer to 3d Objection to Defendant's Election.

3dly. The Election into *One* of the Vacancies is enough: It was not neceſſary to ſpecify *which*.

Anſwer to 4th Objection to Defendant's Election.

4thly. As to the *Swearing in* of *Richardſon*—It is alledged "that he was ſworn in before *L. T.* and *T. B.* then "Bailiffs of the Burrough, *in* DUE *Manner*, and ACCORDING *to the Uſage and Cuſtom* of the ſaid Burrough;' And "that he had taken All the requiſite Oaths:" And they might have traverſed this, and taken Iſſue upon it. But they have demurred generally: And this is good on *General* Demurrer. However, theſe Slips may be amended, on Motion.

Reply. 1ſt Objection to Removal.

The Counſel for the Crown replied That Powers do *not always* ariſe to Corporations, upon *every* Caſe of Neceſſity.

A Pardon will have the ſame Effect in this Caſe, as in all Others.

Where the Corporation is *not* poſſeſſed of the Power, the Amotion is NOT *per legem terræ*.

An ACCEPTANCE *of a Corporator's Surrender* does *not operate* AS *a Diſfranchiſement*.

As to the IMPLIED *Power* given by the Charter—Such a Power is NOT ALLEDGED: And the Court will *not preſume* ſuch a Power againſt the Crown.

As to the Caſe of the Corporation of *Newcaſtle*—Nothing was done in it: Mr *Fetherſtonhaugh* had for very many Years *deſerted* the Corporation and *therefore* the Court ſuſpended granting the peremptory *Mandamus*.

As to Lord *Bruce*'s Caſe in 2 *Strange* 819. It is only a looſe and miſtaken Report of it.

As to the Caſe of *Rex* v. *Plimpton*—It is not ſtated, nor can the Counſel on the other Side give any Account of it.

We do not contend "That *the Crown* can diſfranchiſe a "Corporator by Writ:" But We ſay that the Crown may give Notice of the Determinations of the Law; which its Miniſters are to execute.

Lord

* Lord *Coke* reports what We have cited out of *Bagg*'s Caſe, AS *the Determination of the Court*; not as his own extrajudicial Opinion. * P. 535.

As to the *Doncaſter* Caſe—We have cited it from Lord *Raymond*; We do not know what the Man was. [*v.* 2 Ld. *Raym.* 1564.]

As to the *Cauſe* of Removal, We do not ſay "That a "Portman was *not obliged* to attend the great Court;" But "That it was not neceſſary to the *Exiſtence* of that Court;" Nor is it *ſhewn* to be contrary to the Obligation of their Oath of Office. *Non-Attendance* might indeed be a *Miſdemeanor*, but is NOT *a Cauſe of* FORFEITURE; eſpecially, without SPECIAL *Damage* ſhewn. And it is *ſuch* a Miſdemeanor, that an Indictment or Information will lie againſt a Corporator for it: So that there MIGHT *have been a previous Conviction* in the preſent Caſe. 2d Objection to the Removal.

And though this is an *Information*, not a Mandamus; yet this Man has here ſet out his own *Title*; which appears upon his own Plea to be a *bad* One: And therefore the *Court muſt give Judgment* AGAINST *him*. And this ſeems a very *adequate* Remedy. If a perſon be improperly elected, He is to be *removed* by a Judgment of *Ouſter*. *Afterwards*, indeed, Thoſe who have Right may be *admitted*, upon a Mandamus.

It does not appear that this Court was a CORPORATE *Aſſembly* of the *Mayor*, *Bailiffs* and *Burgeſſes*. And, as to a CONTUMACIOUS *Refuſal* to attend—There is no Pretence to ſuppoſe it: They are only ſaid "Not to have attended "upon *due Notice* given of the Great Courts." There was *no* PARTICULAR *Summons* to attend them; *nor any* PARTICULAR *Call*, for their Advice and Aſſiſtance. 3d Objection to the Removal.

A Corporation can do no *important* Act without their *Seal*. And this Great Court was NO *Court of Record*. 4th Objection to the Removal.

As to the want of *Perſonal* Notice—This is not like the Caſe of a Bond: which obliges the Obligor to *take* Notice. *Palm.* 532. is ſimilar to the Caſe of a Bond: There, *Young* covenanted to find Proviſions for the Steward &c. 5th Objection to the Removal.

Vanacker's Caſe too is quite of another Tendency and Conſideration: There, the Notice was proper Notice to the whole Body; and was taken to include every Member.

The "DUE *Notice* given" is * *not alledged* to be given *Perſonally* TO *them*: And therefore is not confeſſed by the Demurrer.

* V. ante, pa. 519. "Due Notice had "been given, of the "holding, "&c."

As

* P. 536. * As to Lord *Shrewſbury*'s Caſe—The Clerk of the Market is certainly an Office that muſt of Neceſſity be conſtantly attended: And the other Offices there ſpecified and hinted at, are ſuch as are of Neceſſity, for the Adminiſtration of Juſtice; and where the Public muſt ſuffer by the Officers not attending.

Non-Inhabitancy is NO *Part of the Charge* againſt theſe Portmen: Tis *Non-Attendance* at 5 ſucceſſive Courts. But there was NO *Reaſon* for them to think of any SPECIAL *Occaſion* for their Attendance; *nor* any *Particular Notice* to any ſuch Purport.

2d *Point*—The Court will not ſupport an Uſurpation againſt Law.

1ſt Objection to Defendant's Election. The Words are "*Reſidue of* THEM;" "Major part *of* "THEM:" And they are *to* "ASSEMBLE *&c.* All which Expreſſions import a *Number* of Perſons; at leaſt, more than One Individual.

The Caſe of the Burgeſs of the *Devizes* was conſidered as the Act of the *nineteen*: And that Corporation was a fluctuating Body; and any Majority of their Number *for the Time being*, might do the corporate Acts.

Two may elect, in the preſent Caſe; provided they agree; And Two are certainly the Major Part of Two. And theſe Words are *not* merely *directory*. No *Power* of Election is given to ONE only.

And this can't be *preſumed*. They ought to have *alledged* and *ſhewn* ſuch a Power.

4th Objection to Defendant's Election. The *Bailiffs* had no Power *to adminiſter* the Oaths. So that the Defendant did NOT take them duly and effectually.

It was impoſſible for us to *traverſe* what they never alledged.

LORD MANSFIELD now delivered the Reſolution of the Court.

Reſolution of the Court. The *General* Queſtion upon the Plea is, "Whether the "Defendant has ſet out a *good Title* to the Office of a "Portman of the Town or Burrough of *Ipſwich*."

The Title he ſets out is, That upon a Vacancy made by Removal, He was duly elected, ſworn, and admitted into the ſaid Office to fill up ſuch Vacancy.

His Right therefore muſt depend upon two general Points; 1ſt. Whether the *Vacancy* was *duly made*;

2dly. If

* 2dly. If it was, Whether the Defendant was *duly elected admitted* and *ſworn*. * P. 537.

Upon the firſt Point, the principal and material Objections are Two;

1ſt. That the Corporation of *Ipſwich* had *no Power to amove*.

2dly. Suppoſe they have no Power, the *Cauſe* of Amotion is not ſufficient.

Upon the ſecond Point; one Objection is chiefly relied upon; *viz.* That, after the Amotion, *James Wilder* being the ONLY *remaining Portman*, the Election under which the Defendant claims, was SINGLY *By him*: But *One* can not elect.

Then his Lordſhip ſtated the Record; which ſee before *pa.* 517, *&c.*

Upon the firſt Point.

1ſt Objection—That they had *no Power* to amove.

1ſt Objection As to the Power of Removal.

This Objection depends upon the Authority of the ſecond Reſolution in *Bagg*'s Caſe, 11 *Co.* 99: Where it was reſolved, "That no Freeman of any Corporation can be diſ-"franchiſed by the Corporation; *Unleſs* they have Autho-"rity to do it either by the *expreſs Words of the Charter*, or "by *Preſcription*: But if they have *not* Authority either "by *Charter* or *Preſcription*, then he ought to be *convicted* "by Courſe of Law, before he can be removed. And this "appears by *Magna Charta*, *c.* 29: Nullus liber homo ca-"piatur, vel impriſonetur, aut *diſſeiſietur de libero tene-"mento ſuo*, vel libertatibus, vel liberis conſuetudinibus "ſuis *&c*: *niſi* per *legale judicium parium ſuorum*, vel per "*legem terræ*. And if the Corporation *have* Power by "*Charter* or *Preſcription* to remove him for a reaſonable "Cauſe, that *will* be *per legem terræ*: but if they have *no* "ſuch Power, he ought to be *convicted per judicium pa-"rium ſuorum* &c. As if a Citizen or Freeman, be *at-"tainted* of Forgery, or Perjury, or Conſpiracy, at the "King's Suit *&c.* or of any other Crime whereby he is "become infamous; *upon ſuch Attainder*, they may remove "him: So if he be *convicted* of any ſuch Offence which is "againſt the *Duty* and *Truſt* of his Freedom, and to the "*public Prejudice* of the City or Burrough whereof he is "free, and againſt his *Oath*; (as if he burnt or defaced "the Charters or Evidences of the City or Burrough, or "eraſed or corrupted them, and is thereof *convicted and* "*attainted*;)

* P. 538. " *attainted* ;) Theſe and the like are good Cauſes to re-
" move him. And *although they have* lawful Authority
" either by *Charter* or *Preſcription*, to remove any one
" from the Freedom, and that they *have juſt Cauſe* to re-
" move him ; yet if it appears by the Return, that they
" have proceeded againſt him, *without hearing* him anſwer
" to what was objected, or that he was not *reaſonably warn-*
" *ed*, ſuch Removal is void and ſhall not bind the Party ;
" *quia quicunque aliquid ſtatuerit parte inaudita alterâ æquum*
" *licèt ſtatuerit, haud æquus fuerit* ; and ſuch Removal is
" againſt Juſtice and Right."

PREVIOUS CONVICTION was not a Circumſtance at all neceſſary to the judgment in that Caſe : For there was *no ſufficient Cauſe* of Amoval at all. There too, the actual Removal was by the *ſelect Body*, (the Mayor and 9 of the Maſters ;) which can not be, except by Charter, By-Law, or Preſcription.

There are three Sorts of Offences for which an Officer or Corporator may be diſcharged :

1ſt. Such as have *no immediate Relation to his Office* ; but are in themſelves of ſo *infamous* a Nature, as to render the Offender unfit to execute any public Franchiſe.

2d. Such as are *only* againſt his *Oath*, and the *Duty of his Office* as a Corporator ; and amount to Breaches of the tacit Condition annexed to his Franchiſe or Office.

3d. The third Sort of Offence for which an Officer or Corporator may be diſplaced, is of a *mixed Nature* ; as being an Offence *not only againſt the Duty* of his Office, but *alſo* a Matter *indictable at Common Law*.

The Diſtinction here taken, by my Lord *Coke*'s Report of this ſecond Reſolution, ſeems to go to the Power of TRIAL, and *not* the Power of *Amotion* : And he ſeems to lay down " that where the Corporation *has* Power by
" Charter or Preſcription, they may *try*, as well as re-
" move ; But where they have *no* ſuch Power, there muſt
" be a *previous Conviction* upon an *Indictment*." So that *after* an Indictment and Conviction at Common Law, *this* Authority admits, " That the Power of Amotion *is incident*
" *to* EVERY Corporation."

But it is now eſtabliſhed, " that *though* a Corporation *has*
" *expreſs Power* of Amotion, Yet, for the *firſt* Sort of Of-
" fences, there *muſt* be a *previous Indictment and Conviction*."
And there is no Authority ſince *Bagg*'s Caſe, which ſays that the Power of TRIAL as well as Amotion, for the *ſecond* Sort of Offences, is not incident to *every* Corporation.

In

* In Lord *Bruce*'s Case, 2 *Strange* 819. The Court says, * P. 539.
"The Modern Opinion has been, that a Power of Amotion *is incident* to the Corporation."

We all think this Modern Opinion is *right*. It is *necessary* to the good Order and Government of Corporate Bodies, that there should be *such a Power*, as much as the Power to make *By-Laws*. Lord *Coke* says, * "There is a "tacit Condition annexed to the Franchise, which if he "breaks, he may be disfranchised." *11 Co. 98. a.

But where the Offence is *merely against his Duty as a Corporator*, He can only be *tried* for it *by the Corporation*. Unless the Power is *incident*, Franchises or Offices might be forfeited for Offences; and yet there would be *no Means* to carry the Law into Execution.

Suppose a *By-Law* made "to *give Power of Amotion for* "*just Cause*," such *By-Law* would be *good*. If so, a Corporation, by *Virtue of an incident Power* may *raise* to themselves Authority to remove for just Cause, *though not expressly given* by Charter or Prescription.

The Law of Corporations was not so well understood, and settled, at the Time of *Bagg*'s Case, as it has been *since*. And "Whether a Power of Amotion was incident to the "Corporation," could be *no Part* of the Question in Judgment in that Case, or necessary to the Determination of it. The Power of Amotion was there exercised by the *select Body*; and the *Cause was insufficient*; the Offence not being any of the three Kinds for which a Corporator could be disfranchised. And the *Distinction* * there taken, as to the *Mode of Trial*, is certainly *not Law*. For *though* the Corporation *has* a Power of Amotion by *Charter* or *Prescription*, Yet, as to the *first* Kind of Misbehaviours, which have *no* immediate Relation to the Duty of an Office, but only make the Party infamous and unfit to execute *any* public Franchise: THESE ought to be established by a *previous Conviction* by a Jury, according to the Law of the Land; (as in Cases of general Perjury, Forgery, or Libelling, *&c.*) *11 Co. 99. a.

We therefore think the Court was well warranted in Lord *Bruce*'s Case, to *controvert* the Authority of the Proposition, *collected* from what is said in *Bagg*'s Case, "That there can "be *no* Power of Amotion, *unless* given by Charter or "Prescription:" And We think that from the Reason of the Thing, from the Nature of Corporations, and for the Sake of Order and Government, This Power IS INCIDENT, as much as the Power of making By-Laws.

The second Objection upon this Point was, That the CAUSE is not sufficient. 2d. Objection as to the Cause of Removal.

* P. 540. * The Plea ſets forth two *ſtated* Days in the Year, *viz.* the 8th Day of *September* and *Michaelmas* Day for holding Great Courts at the *Moot-Hall*; and "that the Bailiffs "may call a Great Court at any *other* Time." Great Courts were called on the 13th of *January*, the 15th of *April*, the 9th of *June*, and the 19th of *June*, 1755. *Before the Holding of the ſaid ſeveral Courts reſpectively*, DUE *Notice had been given of the Holding thereof reſpectively.* The Plea ſtates likewiſe another Great Court on the 8th of *September* 1755; *due Notice* of the Holding thereof having there been previouſly given. And the Portmen removed did not attend theſe Courts; but *wilfully abſented* themſelves.

It is *not* ſtated "that the removed Portmen had PERSO-"NAL Notice;" And the Fact certainly is that they "had *not:*" For, where perſonal Notice *was* given to anſwer the Charge, the Plea alledges it preciſely, and in a different Manner; Beſides, if Truth would have warranted them, they might have * amended.

* The Defendant's Counſel had once propoſed to move to amend; but gave it up, on finding their Facts inſufficient to ſupport it.

The Notice then of Holding theſe Great Courts muſt have been by ſome cuſtomary Signal, (as Sounding a Horn, or Tolling a Bell;) which the removed Portmen, in Fact, might know nothing of.

It is *not* alledged that the Portmen's Preſence was *neceſſary* to the Holding the Great Court; On the contrary, the Preſcription is alledged to be, "that the Bailiffs, Bur-"geſſes and Commonalty, or *ſo many* of them as WOULD "*be preſent*, have met, or aſſembled in the *Moot-Hall*."

It is *not* alledged particularly, that any *particular* Buſineſs was obſtructed or defeated by the Portmen's Abſence. The Plea alledges, "that they *wilfully* abſented:" But that is a *Conſequence of Law.* In Pleading, they muſt alledge *Facts*, from which the *Court* may judge "Whether the Ab-"ſence was wilful:" Upon which Facts, *Iſſues* may be taken, and tried by a Jury.

It is clear from the Plea, that the Portmen had *full Notice* of the CHARGE againſt them, and full Opportunity to have been heard: And therefore I lay all the Objections upon *that* Head, out of the Caſe. But, if the CHARGE was *inſufficient*, they had no Occaſion to defend themſelves.

This brings the whole to the Queſtion, "Whether an "Abſence from *four occaſional* Great Courts, and *One upon* "*a ſtated Day*, ſo circumſtanced, is a *ſufficient* CAUSE of "*Amotion.*

There

* There is *no Authority* which ſays it is. Though the *Uſual Signal* is given for holding a Great Court, a Member may *not know* of it: Though he ſhould know of it, he may be innocently abſent, where he *thinks* his Preſence not at all neceſſary, and where he does not *imagine* that any Buſineſs of Conſequence is to be propoſed. * P. 541.

In the Caſe of *Rex* v. *Mayor and Aldermen of Carliſle*, * The Court argued in this Manner, That where an Alderman receives a Summons to appear at the *Common Council*, he might conſider that his Preſence was of no Conſequence, and ſo ſtay away; And becauſe he might innocently ſtay away from the Common Council, It was holden, that he ſhould have had a *particular* Summons to meet the *Mayor and Aldermen*: And for want of *ſuch* Summons, an Amotion by the Mayor and Aldermen, *at that Common Council*, was holden to be void. * Trin. 1720. 6 G. 1. B. R. [V. 1 Strange 385, 386.]

There is not an Officer or Freeman in the Kingdom, (who is a Member of an Aſſembly,) that might not be removed or diſfranchiſed, if this Doctrine was given Way to. At Times, *Every* Alderman, *Every* Common Council Man, not neceſſary to the Conſtitution of the Aſſembly, *knowingly omits attending*.

It is not neceſſary, and would be highly improper at preſent, to ſay *what kind* of Abſence, or under *what Circumſtances*, Non-Attendance may be a Cauſe of Forfeiture. It is ſufficient that the Abſence, with all the Circumſtances alledged by *this* Plea, is *not* a Cauſe.

And We are All of Opinion that it is *not*.

The ſecond General Point is, "Whether the Defendant "was *duly elected*, by the *One* remaining Portman." But that is now become unneceſſary. If it had been material, We are inclined to *ſupport* the Election. 2d. Point; (viz. The Validity of the Defendant's Election.)

However, It is not *now* neceſſary to enter into *that* Point; becauſe We are, upon the *former* Point very clear "that the Cauſe of Amotion alledged and relied upon in "the Plea, is not *a ſufficient Cauſe* of Amotion."

JUDGMENT for the KING.

* P. 542. * Rex *verſ.* Mary Mead.

A *Habeas Corpus* having iſſued in the laſt Vacation, at the Inſtance of *John Wilkes*, Eſq; to bring up the Body of *Mary Wilkes* Wife of the ſaid *John Wilkes*, and Daughter of the ſaid *Mary Mead*, before Mr. Juſt. *Deniſon*; Mrs. *Mead* now brought Her *into Court*.

The Subſtance of the Return was, That her Huſband, (having uſed her very ill,) *in Conſideration* of a great Sum which She gave him out of her ſeparate Eſtate, *conſented* to her living alone, executed *Articles of Separation*, and *covenanted* (under a large Penalty) never to diſturb Her or any Perſon with whom She ſhould live. That ſhe lived with Her Mother, at her *own* earneſt Deſire; and that this Writ of *Habeas Corpus* was taken out with a View of ſeizing Her by Force, or ſome other *bad Purpoſe*.

The Court held this Agreement to be a formal *Renunciation* by the Huſband, of his Marital Right to ſeize Her or force Her back to live with Him.

And they ſaid that *any Attempt* of the Huſband to ſeize Her by Force and Violence, would be a *Breach of the Peace*. They alſo declared that any Attempt made by the Huſband, to moleſt Her *in her preſent Return from Weſtminſter-Hall*, would be a *Contempt* of the Court. And they told the Lady, She was at full Liberty to go where, and to Whom, She pleaſed.

V. Rex v. *Clarkſon et al.* 2 *Strange* 444, 445: Where the Court only took Care that the Young Lady ſhould be under no illegal Reſtraint; and ordered a Tip-Staff to ſee Her ſafe Home, to her Guardian's, as had been formerly done in Lady *Harriot Berkley*'s Caſe.

Rex v. *Captain Liſter, Huſband of Lady Rawlinſon.* 1 *Strange* 478.

Lady *Vane*'s Caſe *M. & H.* 17 *G.* 2. *B. R.*

Rex v. *Johnſon*, 1 *Strange* 579. *H.* 19 *G.* 2. 2 Ld. *Raym.* 1334. S. C. A Child was *delivered* to its proper *Guardian* by the Court.

Rex v. *Smith*, 2 *Strange* 982: Where indeed the Boy was *only ſet at Liberty*; And *Johnſon*'s Caſe was ſaid to be carried *too far*.

Rex v. *Griffith*, *H.* 8 *W.* 3. *B. R.* And

Lady *Catherine Anneſley*'s Caſe.

Rex

* Rex *verſ.* Wright, Clerk.

* P. 543.

MR. *De Grey* ſhewed Cauſe againſt quaſhing the Indictment.

Mr. Serjeant *Hewitt* had moved to quaſh this Indictment charging the Defendant, That He, being a *Spiritual* Perſon, did TAKE *to Farm* ſeveral Lands *&c*; againſt the Statute of the 21 *H.* 8. *c.* 13. §. 1. For that *no Indictment* will lie, where a Statute *creates a new* Offence, and gives a *particular* Remedy. On *Monday* 13th *February* 1758 (upon Mr. *De Grey*'s then comming to ſhew Cauſe) the Serjeant propoſed *Three* Objections: *viz.*

1ſt. An *Indictment* will *not lie:* It ought to be a Proceeding *by Action*, or by *Information*; (which are the two particular Methods of proceeding, ſpecified and preſcribed by this Statute.)

2d. *No Offence* is here charged. For OCCUPATION is the Offence for which the Act gives the Forfeiture: And here, *no Occupation* is *charged*; 'Tis only "That he did TAKE *to* "*Farm.*"

3d. It can *not* be proſecuted at the SESSIONS: For the Words of the Act are "in any of the King's *Courts.*"

Firſt——An *Indictment* will *not* lie: Becauſe the Statute *creates* the Offence, and has preſcribed a *particular Method* of proceeding; and has *no* General Words. It enacts "that "no Spiritual Perſon ſhall take to Farm *&c*; *upon Pain* to "forfeit 10*l.* for every Month that He *&c*; The One Half, "of which Forfeiture to be to the King; the Other Half, "to every ſuch Perſon that will ſue for the ſame *by* Origi"nal Writ, Bill, or Plaint of Debt, or by any Information "in any of the KING's *Courts.*" 2 *Hawkins, P. C. c.* 25. § 4. *p.* 211. is in Point, "That where a Statute makes a "*new* Offence, and appoints a *particular* Manner of pro"ceeding, an Indictment will *not* lie." *Cro. Jac.* 643, 644. *Caſtle*'s Caſe (1ſt Exception) is alſo moſt expreſs in Point. 4. *Mod.* 144. *Rex & Regina* v. *Marriott.* S. P. *Rex* v. *Gluff*, *Caſes temp. Will.* 3*tij. B. R.* 104. S. P. *

* But this was only quaſhed Niſi, (or a Rule to ſhew Cauſe,) on a Motion heard ex parte, only.

LORD MANSFIELD—Let us hear an Anſwer to this Objection firſt: For it ſeems a ſtrong One; this being NO OFFENCE *at* COMMON-*Law.*

Mr. *De Grey*, *contra*, proceeded to ſhew Cauſe on Behalf of the Proſecutor.

As

1ſt. *As to the 1ſt Objection——

* P. 544. 2 *Hale's Hiſt. P. C. fo.* 171. is expreſs, that if the Act does alſo contain a *prohibitory* Clauſe, the Offender may be indicted upon the prohibitory Clauſe, notwithſtanding the Penalty.

Caſtle's Caſe *Cro. Jac.* 643. *M.* 20 *J.* 1. is incorrectly reported: as appears by 2 *Ro. Rep.* 247. S. C. Which ſays "that the Indictment was quaſhed for *ſome* of the Exceptions." Therefore *Caſtle's* Caſe is not an Authority in the preſent One: As it is only a partial Report upon Memory; and has miſtakes in it (as 40*l.* inſtead of 20*l.* for one Inſtance.) 1 *Mod.* 34. *Croſton's* Caſe on 17 *C.* 2. *c.* 2. "To reſtrain Non-Conformiſt Miniſters from inhabiting in Corporations," is moſt full and clear in Point to the contrary. 1 *Ventr.* 63. S. C. this very Objection was diſallowed. 3 *Keb.* 75. *Rex* v. *Baker. Raym.* 219. S. C. *

* The two laſt are looſe Notes; and adjourned.

As to the 2d Objection. The *Occupation* is only to aſcertain the Quantum of the Penalty; *viz.* 10*l.* for every Month that he ſhall occupy: But the TAKING *to Farm*, is the Offence prohibited.

2d.

3d. As to the 3d Objection. The Indictment may be brought at the Seſſions, and proſecuted there.

In anſwer to the Caſe cited in Support of the 1ſt Objection, of *Rex et Regina* v. *Marriott* according to 4. *Mod.* 144. Ld. Ch. J. *Holt* held *againſt* the other two Judges, *Dolben & Eyre*; and thought an Indictment the proper and reaſonable Method. *Carthew* 263. S. C. *Rex* v. *Marriott*, refers to 4 *Mod.* 144, and obſerves that it was *againſt the Opinion* of Ld. Ch. J. *Holt*. 1 *Shower* 398 is S. C. *Dominus Rex* v. *Marriott*; And the Reporter, (who Himſelf took the Objection,) ſays "That the Rule was pronounced by Ld. "Ch. J. *Holt*, *conſentientibus aliis*, thus—"*Let it ſtay.*" †

† But *Eyre* added, "It cannot be maintained I doubt." Note alſo, that Shower's Report of what paſſed in this Caſe, is of *Tr.* 4. *W. & M.* (as likewiſe indeed is 4 *Mod.* 144:) But Carthew's is of *Hil.* 4 *W. & M.* which is two Terms latter.

LORD MANSFIELD—I always took it that where *new created* Offences are only prohibited by the *general prohibitory* Clauſe of an act of Parliament, an Indictment will lie: But where there is a prohibitory *particular Clauſe* ſpecifying only *particular Remedies*, there *ſuch particular Remedy* muſt be *purſued*. For otherwiſe the Defendant would be liable to a double Proſecution: One upon the general Prohibition, and the other upon the particular ſpecific Remedy.

Therefore,

* Therefore, if there be any Doubt or Difficulty about this Matter, it will be better to enlarge the Rule, till next Term. * P. 545.

Mr. Juſt. DENISON laid down the Diſtinction thus; *viz.* That where an Offence is *not ſo at Common Law*, but *made an Offence* by Act of Parliament; yet an Indictment *will* lie, where there is a *Subſtantive* prohibitory Clauſe in ſuch Act of Parliament; (though there be afterwards a particular Proviſion, and a particular Remedy given:) But it is * otherwiſe, where the Act is *not Prohibitory*; but *only* inflicts the Forfeiture, and ſpecifies the Remedy. ‡ * V. 2 H. H. P. C. 171. ‡ V. poſt 803, 804, 805.

Mr. Juſt. WILMOT alſo took it ſo; and that this Point had been ſettled, later than any of the Caſes cited. [In *Hil.* 2 *G.* 2. *B. R. Rex* v. *Penſacks*, and alſo in *Rex* v. *Malard*, the ſame Term, It was ſettled "that an Indictment will "*not* lie, where an Act of Parliament *makes a new* Offence, "and *preſcribes a particular Method* of Proceeding."

He ſaid He had always underſtood it to be a ſettled Diſtinction between a ſubſtantive independent Clauſe, and a Prohibition *ſub modo*.

And, it would be hard to puniſh a man *twice* for the ſame *new* Offence.

Mr. Juſt. DENISON—*This Act* does not ſeem to me to give *the King* ALONE, a Power to proſecute *at all*, for this new Offence. However I ſhall give no Opinion now, as the Rule is enlarged.

On this Day, Serjeant *Hewitt* informed the Court that Mr. *De Grey gave up* this Matter.

Lord MANSFIELD—I do not at all wonder at it: I thought he would do ſo. I have looked into it: And there is nothing in it. That Caſe of *Croſton* had been *denied* many Times. Beſides, Mr. *Clayton* has informed me of a Caſe that was determined upon the 3d Objection, "of "its being *at Seſſions*."

RULE "To quaſh the Indictment," MADE ABSOLUTE.

Rex *verſ.* Inhabitants of Bank-Newton.

Thurſday 13th April 1758.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto Edition of my SETTLEMENT-CASES, No. 145. pa. 455.

Rex

* P. 548. Saturday, 15th April 1758.

Rex *verſ.* Peach et al'.

CAUSE was now ſhewn againſt an Information which had been moved for, at the *Application* of ſome Perſons who now appeared to be a Parcel of infamous Cheats and Gamblers, againſt ſeveral others of the SAME *Profeſſion and Character*; for a *Conſpiracy to cheat* them out of about 900*l.* at a Foot Race, by a moſt ſhameful Tranſaction of Fraud, Colluſion, and Bribery, to induce the Racers to run Booty.

But it appearing moſt clearly to the Court, and it being too plain to be diſputed by the Counſel for the Proſecutors themſelves, that the Parties *complaining* and thoſe *complained* of, were (*all of them* alike) a Parcel of infamous Cheats;—

The COURT unanimouſly refuſed to give the Complainants the EXTRAORDINARY *Aſſiſtance* of this Court, to enable them to attack their Brethren in Iniquity, (who had probably, as the Court not without Reaſon ſuſpected, quarrelled with them about the Diviſion of their ill-gotten Spoils:) They referred the Complainants to the *ordinary Remedy* of Action or Indictment; eſpecially as the Facts alledged ſeemed to be within the Acts of Parliament made to prevent exceſſive Gaming. And, accordingly,

The RULE to ſhew Cauſe "Why there ſhould not be "an Information againſt them," was DISCHARGED.

* Carleton ex dimiſſ. Griffin *verſ.* Griffin.

Tueſday, 18th April 1758.

THIS was a Special Caſe in Ejectment, brought upon the Demiſe of *John Griffin*, the Teſtator's Heir at Law. A Verdict had been given for the Plaintiff, ſubject to the Opinion of this Court, on the following Caſe: *John Griffin* (the Teſtator) being ſeiſed *&c.* and being *&c.* on the 2d of *May* 1752, wrote upon a *Sheet of Paper* with his own Hand as follows; *viz.* "Know all Men by theſe Pre- "ſents, that I *John Griffin &c*, make the aftermentioned, "my laſt Will and Teſtament: And when it pleaſe God to "call me, I pray God direct my Relict. I make my pre- "ſent Wife, my whole and ſole Executrix of what it "hath pleaſed God to bleſs me with. I order my Son "*John Griffin*, my Son by my firſt Wife, 600*l.* I have "600*l.* in the three *per Cent.* Annuities: Which I order, "not to be ſold; but I order my Wife to leave the Inte- "reſt thereof to help to bring up my Daughter *La-*

"*viner.*

" *viner.* I likewiſe have two *Freehold* Houſes in *&c*; " [Which are the Premiſſes in queſtion:] Which are to be " for the ſame Uſe, to help to bring up my Daughter " *Lavine*r, and *her Heirs for ever.* My Daughter to take " Poſſeſſion of the Annuities at her *Age of* 25. And if it " pleaſe God my Daughter die before her Mother, and un- " married and without a lawful Heir, then the ſaid two " Houſes to go to my ſon *John* and his Heirs for ever."

It concludes—" I pray God to bleſs and direct my Wife " and Daughter and Son. And I die in Peace with all " Mankind: And I hope the Lord Jeſus Chriſt will re- " ceive my Soul. And this is my laſt Will; and not any " other. 2d Day of *May* 1752."

And he *ſubſcribed* it, at the ſame Time when he wrote it: But there was *no Seal nor Witneſs* to it.

And it was further ſtated, that on the 5th of *January* 1754, He wrote on the *ſame Sheet of Paper*, the following Words, *viz.* " Memorandum—*Blackman-Street*, 5th *Ja-* " *nuary* 1754: Whereas I have laid out *&c.*; on a Lighter " called *&c*: and the Barge called the *Lemon &c*; All " theſe, and alſo all *&c*; at my Death, All ſhall be at my " preſent Wife *Mary*'s Diſpoſal. And this not to diſan- " nul any of the former Part made by me, the 2d of *May* " 1752: Except that my Wife ſhall not be liable to pay " to my Son *John &c.* Witneſs my Hand, *J. Griffin*, Sen."

N. B. The Will was written on the firſt and ſecond Sides of a Sheet of Paper: And the Codicil was begun either * upon the End of the Second or the Beginning of the Third, and written upon the 3*d* Side. (Which Circumſtance Lord *Manſfield* thought material, though not deciſive.) * P. 550.

And all this Codicil (or whatever it may be called,) related *only* to the PERSONAL Eſtate and *not at all*, to the REAL.

The Teſtator ſubſcribed this in the Preſence of Three Witneſſes. And then he took the ſaid *Sheet of Paper* in his Hand, and declared IT to be his Laſt Will and Teſtament, in the Preſence of the ſaid 3 Witneſſes; and then delivered it to them, and deſired they would atteſt and ſubſcribe it in his Preſence, and in the Preſence of each other: Which they accordingly did.

Upon this Special Caſe, Two Queſtions are reſerved for the Opinion of this Court: *viz.*

1ſt, Whe-

1ſt. Whether the Republication of the ſaid firſt Will, (made in 1752,) upon the 5th of *January* 1754, be a *Publication* or *Republication* of his firſt Will, *within the Statute of Frauds.*

2d Queſtion. Whether any Eſtate paſſed by the firſt Will, either to the *Daughter* or to the *Mother.*

Mr. *Bernard* argued on Behalf of the Plaintiff, *John Griffin*, Heir at Law to the Teſtator.

This was no good Will, to paſs Lands, beyond all Doubt, *till* the 5th of *January* 1754. And what happened then was *neither a Publication* nor a *Republication* ſufficient to make it a good Will within the Statute of Frauds. Here are *two diſtinct Inſtruments* at *two different Times*: The firſt, UNATTESTED, relating to the *Real* Eſtate; The ſecond, *ſigned, publiſhed*, and *atteſted* according to the Statute of Frauds, relating to the *Perſonal.* But the firſt was *originally bad*; and could *not* be made good, by the ſubſequent Tranſaction. In Support of which Aſſertion, He mentioned the Caſe upon Serjeant *Maynard*'s Will, cited in *Comyns* 384. in the Caſe of *Acherley* v. *Vernon et al.*

He likewiſe cited *Peuphraſe* v. *Ld. Lanſdown et al*, *H.* 11. *Ann. Rot' lo* 620. (on the Earl of *Bath*'s Will,) which is alſo cited in the Caſe of *Acherley* v. *Vernon*, *Comyns* 384; Where the firſt Will was only executed, not atteſted; And on making a Codicil to it, the Teſtator took the Codicil in one Hand, and the Will in the other, and ſaid "This is "my Will &c; And I publiſh this Codicil as Part thereof;" and ſign the Codicil in the Preſence of the Witneſſes who * P. 551. * ſubſcribed it in his Preſence: It was holden to be no Republication of the Will. And this Caſe alſo proves that there can be no Republication *by Implication*, as it was there expreſsly determined: But the Will ought to be re-executed: or otherwiſe a Deviſe of Lands ſhall not be good.

Second Queſtion. No Eſtate paſſes by this Will, *either* to the *Mother* or to the *Daughter*: But it deſcends to the Plaintiff *John Griffin*, as Heir at Law to the Teſtator.

The Statute of Uſes does not operate; becauſe there is no Tranſmutation of Eſtate: Without which, no Uſe can ariſe. Now here the Eſtate never paſſed out of the Heir at Law.

He made 3 Sub-diviſions, under this ſecond Queſtion.

1ſt Sub-

1ſt Subdiviſion. No Eſtate paſſes to the *Mother*. The Words of the Will muſt ſquare with the Intent of the Teſtator. And here the Words do not extend to the Real Eſtate; becauſe they are accompanied with the Word "*Executor*." *Precedents in Chancery* 471. *Piggot* v. *Penrice*. "I make my Niece *Gore*, *Executrix* of all my Goods, *Lands*, "and Chattels." Her Lands of Inheritance did *not* paſs: *Though* She had no Term, or Intereſt for Years, in any Lands whatſoever.

2d Subdiviſion (of the 2d Queſtion) Nor does any Eſtate paſs by this Will to the *Daughter*. The Heir at Law ſhall not be diſinherited by a ſtrained Conſtruction.

3d Subdiviſion (of the 2d Queſtion.) The Statute of Uſes cannot operate for want of a Tranſmutation of Eſtate: For here, it never paſſed out of the Heir at Law; and therefore no Uſe could ariſe. For no Uſe can ariſe without a Tranſmutation of Poſſeſſion. To prove which Poſition he cited 1 *Inſt.* 271. *b.* 6 *Rep.* 17. *b.* 18. *a.* Sir *Edward Cleve*'s 1 *Rep.* 176. *a. b.* 1 *Leon.*—*Moore* 569. So that no Uſe could here ariſe. And no Eſtate or Intereſt paſſed either to the Mother or Daughter under this Will.

Therefore He prayed Judgment for the Plaintiff.

Mr. *Burrell contra* for the Defendant.

1ſt Queſtion. Whether the Publication of the ſecond Inſtrument in the Manner as ſtated, is a Publication or *Republication* of the *former* within the Statute.

2d Queſtion. Whether ANY *Eſtate paſſes, either* to the *Mother*, or *Daughter*.

*Firſt. The firſt Will indeed has not the Requiſites appointed and required by the Statute of Frauds (29 *C.* 2. *c.* 3.) as eſſential to a Will of Lands. But that Statute has been always *liberally conſtrued*, in Favour of Wills. 3 *Peere Wms. fo.* 252, 254. *Stonehouſe et Ux'* v. *Sir John Evelyn*, (the laſt Point,) is a Proof of this: Where it was holden "That the Teſtatrix's *owning* her Hand was ſufficient; "though the Witneſſes did not actually ſee her ſign." This was a liberal Conſtruction as to the *Perſon ſigning*. So has been the Conſtruction alſo as to the *Witneſſes* atteſting. 2 *Chancery Caſes* 109. *Anonymous:* A Will atteſted by 3 Witneſſes, who were *not preſent together*, but ſubſcribed, *at ſeveral Times*, was decreed to be good. 2 *Salk.* 688. *Shires* v. *Glaſcock*. The Atteſtation was adjudged good, becauſe

becauſe the Teſtator *might* have ſeen the Witneſſes ſubſcribe, through a broken Window. So, 3 *Lev.* 1 *Lemayne* v. *Stanley*: As to the *Teſtator's Signing* his Name.

The Will was dated the 2d of *May* 1752, and was ſubſcribed by the Teſtator; but was not then indeed, either witneſſed or ſealed. But it may be conſidered as intended to be afterwards executed.

Then in *January* 1754, He added a Codicil, on the *ſame* Sheet of Paper; took the ſaid Sheet of Paper in his Hand; declared IT to be his Will; and deſired the Wineſſes to atteſt *it*. This muſt be either a *Publication*, or a Republication. The very Caſe reported in *Comyns* 381. of *Acherley* v. *Vernon*, *M.* 10 *G.* 1. in Chancery, was a Determination, "That what Mr. *Vernon* there did was a *Republication*; And "that the Will and Codicil made *but one Will:*" And this Determination was affirmed in the Houſe of Lords.

2d Queſtion. Whether ANY *Eſtate paſſed* to either the *Mother* or the *Daughter* by this Will: (For if ANY Eſtate paſſed to *either*, the Plaintiff in Ejectment cannot recover.) 2 *Siderf.* 75. *Marret* v. *Sly*, is a Proof of great Allowances and Indulgence to the Teſtator's Manner of Expreſſion. [See the 3d Point of that Caſe; where the Words were very falſe *Engliſh*.]

In the preſent Caſe, they took (reſpectively,) a *Chattel*-Intereſt to the *Wife*; an Eſtate in *Fee* to the *Daughter*: Or at leaſt, they took *ſuch* an Eſtate as is ſufficient to preclude the Plaintiff; (whatever their Eſtate may, in Nicety of Law, be.)

As to the Words of the Will—The firſt Clauſe relates only to the Wife, *as Executrix*. "I order *John Griffin* 600*l.* "I have 600*l.* in *&c.* I leave the *intereſt &c*, to help to
P. 553. " bring up my Daughter *&c.* I have two *Houſes &c*: "Which are to be to the *ſame Uſes*, *viz.* to help to bring up "my Daughter" *&c.*—He meant a *Chattel*-Intereſt to the *Mother*, for the *Benefit* of the Daughter, *till* She came to 25 Years of Age; and TO *the Daughter from* her Age of 25.

The Remainder is deviſed to the Heir at Law, *after* the Death of the Daughter, unmarried and without lawful Heir, in the Life-time of her Mother. Therefore he ſhall *not* have it BEFORE that Event. *Carter* 26, 27. 3 *Rep.* 19. 6 *Rep* 95. *Cro. Jac.* 75. *Equity Caſes abridged* 179. Title *Deviſes*, *pl* 6. 2 *Peere Wms.* 194. *Newland* v. *Shephard*, (a ſtrong Caſe;) Where a Deviſe of the Produce and Intereſt, in Truſt for the Grand-Children, *till* 21, was decreed to paſs the abſolute Right and Property of both

Real

Real and Perſonal Eſtate, to the Grand Children *after* that Age: For the Heir at Law was to have no Concern in it. So here, *John* the Son of the Teſtator, was to have no Concern in this Eſtate, *till* the Death of the Daughter.

Boreaſton's Caſe 3 *Rep.* 19. was holden to be a *veſted* Remainder. So here, it is a *veſted* Remainder in the *Daughter*. Therefore the Plaintiff can have no Demand. Wherefore he prayed that the *Poſtea* might be delivered to the Defendant.

Mr. *Barnard* in Reply—

1ſt. The Teſtator taking up the Paper in his Hand, ſaid, "This is my laſt Will and Teſtament," or "It is my laſt "Will and Teſtament," Which Act and Manner of Expreſſion can only mean the *Inſtrument* that he had *then* ſigned in their Preſence.

The preſent Codicil has NO *Words of Confirmation:* Nor does it at all relate to *Land*; but *only* to *perſonal* Eſtate.

2d Point. Neither the Mother or Daughter took *any* Eſtate. The Words are, "I likewiſe have two Freehold "Houſes, which are to be *&c.* to help to bring up my "Daughter *Laviner*, and her Heirs for ever *&c.* And if "my Daughter dies unmarried and without lawful Heir, "in the Life-time of her Mother, then to go to my Son "*John* and his Heirs for ever." As to the Mother, the Words are, "I make my Wife *Mary Griffin* Sole *Executrix* "of all that it hath pleaſed God to bleſs me with." And there is no Other Diſpoſition, to the Mother.

An Eſtate ſhall never be taken by Implication, but from Neceſſity. And here is no Neceſſity.

*Lord MANSFIELD. The Caſe is accurately ſtated: For it is *not* ſtated to be either *a Will*, or a *Codicil*; but a SHEET OF PAPER, written *&c.* *P. 554.

Firſt, This is a Will of an illiterate Man, drawn by himſelf.

At firſt, In 1752, the Teſtator did not know that any Witneſſes were neceſſary. In 1754, he had found that they were neceſſary. Then he makes a ſubſequent Diſpoſition: Which is a *Memorandum* to be *added* to it. But he does not *call* this a *Codicil*; Nor does the Caſe *ſtate* it to be *ſo*. He plainly conſiders the whole as *one entire* Diſpoſition: And he expreſsly declares in the latter, "That he does "not thereby mean to diſannul any Part of his *former* "Deviſe or Diſpoſitions." There

There is not a Tittle in the latter, that relates to the *Real* Eſtate. Therefore the only Intent of having the 3 *Witneſſes*, was and muſt be to *authenticate the* FORMER.

The *Signing* the former, does *no Harm*; It makes it more ſolemn; but does *not hurt* it.

Then the Publication of it is AS *of a Will*—He takes up the Sheet of Paper, and holding up the *ſaid Sheet* of Paper, ſays "It is my Will." And certainly, He did not mean a *Part* of it *only*; but the *Whole* of it. And he deſires them to atteſt it All this muſt relate to the Whole that was written on this Paper.

The Second Point is as plain *upon the bare reading*, as any Argument can make it.

There can be no Doubt of the Deviſe to the *Daughter*; whatever may be the Doubt of the Intereſt bequeathed to the *Mother*, till the Daughter comes of Age, for her Maintenance. But it is ſufficient to bar the Plaintiff that an Intereſt is given to *One* of them.

Therefore it is clear for the Defendant on both Points.

Mr. Juſt. DENISON concurred—A Man may make his Will at different Times: And the Witneſſes may atteſt at different Times. Here an illiterate Man makes and ſigns his Will; In which there is a Deviſe of Lands. To be ſure, if He had died before Atteſtation, the Deviſe of the Land had not been valid. But afterwards, he adds more to it on the *ſame* Sheet of Paper, and declares "That he "does not thereby mean to diſannul any Part of his former
P. 555. " Deviſe and Diſpoſition;" and ſigns it; and then takes the Sheet of Paper in his Hand, and declares it to be his laſt Will and Teſtament, in the Preſence of 3 Witneſſes; and deſires the Witneſſes to atteſt it: Which they do in his Preſence *&c.*

This muſt be conſidered as One ENTIRE *Will*, made at different Times; and atteſted agreeable to the Statute of Frauds.

As to the Second POINT—It is not at all material, *What* SORT of Intereſt the Wife and Daughter, or either of them take under this Will: It is ſufficient, that they take *ſome* Sort of Intereſt ſufficient to preclude the Plaintiff's Demand. And *this* they certainly do.

Mr.

Mr. Juſt. WILMOT concurred with Lord *Mansfield* and Mr. Juſt. *Deniſon*. *He* alſo conſidered this as an *entire* Inſtrument, and as a *Continuation* of the former Act.

The Teſtator himſelf calls it a "*Memorandum*," (*not* a Codicil;) and declares "that he did not mean thereby "to diſannul any Part of his *former* Deviſe or Diſpoſiti-"ons." He only takes up the Conſideration of ſomething further that had occurred to him, ſince his writing the former: And it is not material, whether he does this, at two *Days* or at two YEARS Diſtance from writing the former Part. A Man is not obliged to make his *whole* Will, *all at the ſame* Time.

And the Teſtator's having originally *ſigned* the former Part, is out of the Caſe, and makes no Difference: For it was not at all neceſſary or material to it, as a Will of *perſonal* Eſtate; and the Signing *alone*, unattended with the other Requiſites, was not ſufficient to render it effectual as a Will of *Land:* Therefore it was *totally immaterial*. And in *January* 1754, having written the Memorandum with his own Hand, on the *ſame* Sheet of Paper, He takes the ſaid Sheet of Paper in his Hand, and declares "*It* is his "laſt Will and Teſtament;" and deſires them to *atteſt it as ſuch*, in his Preſence and in the Preſence of each other: —Which they do. So that there can be no Sort of Doubt that this was a good *Publication* of this *as his Will*, within the Statute of Frauds.

As to the Second POINT—It is not at all material, *what Species* of intereſt the Teſtator's Wife and Daughter, or either of them may have in theſe Houſes; provided that they or either of them have *ſuch* an Intereſt as is ſufficient to intitle them to the Poſſeſſion of the eſtate: For *if* they have *ſuch an Intereſt* in them or in either of them, the Plaintiff cannot recover in Ejectment againſt them.

Now I ſhould think that there is a CHATTEL-*Intereſt* in the *Mother*. But be that as it may, here is a Deviſe "to * "the Daughter *and her Heirs*," expreſsly; (however in- * P. 556.
accurately this illiterate Teſtator has worded what accompanies it:) and therefore She ſeems to have a *Fee*; (though liable to be controlled by certain Events that may happen.) But thus much at leaſt, is clear; *viz.* that his *Son* (*John Griffin*, the Plaintiff's Leſſor,) was not to take, TILL the Teſtator's Daughter ſhould be *dead without Iſſue*.

So that it is extremely clear and plain, that *either* the Mother *or* the Daughter have *ſuch* an intereſt as intitles them to the *Poſſeſſion* of the Eſtate.

Per * *Cur.* unanimouſly,
Let the POSTEA be delivered to the DEFENDANT.

* Mr. Juſtice *Feſter* was abſent.

Rex

Thurſday 20th April 1758.

Rex *verſ.* Young and Pitts, Eſquires.

A Motion was made on 10th *May* 1757, for an Information againſt theſe two Juſtices of the Peace, for *arbitrarily*, *obſtinately*, and *unreaſonably* REFUSING TO GRANT A LICENCE to One *Henry Day*, *to keep an Inn* at *Everſley*; where it was alledged and ſworn to be fit and proper and even neceſſary that there ſhould be an *additional* One, (there being *One* there already;) and for which Occupation of keeping an Inn, this Man was (as theſe two Juſtices themſelves had allowed on a former Occaſion) a *proper* Perſon, they having before licenſed Him to do ſo *at another Place*.

Upon this Original Motion—

Lord MANSFIELD and Mr. Juſt. DENISON were of Opinion, that notwithſtanding this was a Matter left in a great Meaſure to the *Diſcretion* of the Juſtices, Yet if it appeared to the Court, from ſufficient Circumſtances laid before them, that their Conduct was influenced by *partial*, *oppreſſive*, *corrupt*, or *arbitrary* Views, inſtead of exerciſing a fair and candid Diſcretion, The Court might call upon them to *ſhew the* REASONS whereby they *guided their Diſcretion:* And therefore they were for granting the Rule to ſhew Cauſe, *as prayed*. But,

Mr. Juſt. FOSTER (who happened to know the Place, and ſaid there was *another* Houſe of good Entertainment there already,) thought it ſufficient to make a Rule upon the two Juſtices "To ſhew Cauſe why they ſhould not GRANT "*this Licence*." And

Lord MANSFIELD and Mr. Juſt. DENISON concurred with Him, to expreſs the Rule in that Manner, though the
* P. 557. * Subſtance was the ſame: becauſe, if they did not ſhew ſufficient Cauſe, the Conſequence muſt be granting an information.

The COURT therefore unanimouſly—(Mr. Juſt. *Wilmot* being abſent in Chancery) made a RULE upon theſe two Juſtices to ſhew Cauſe "*why they did* NOT "GRANT *this Licence* to this *Henry Day*."

On *Monday* 27th of *June* 1757, upon ſhewing Cauſe—The Juſtices, by their Affidavits, made *no Perſonal* Objections to *Day*; but conſidered the *Certificate* as *inſufficient*, becauſe not ſigned by the Parſon, Vicar or Curate.

The

The COURT was of Opinion "that the Certificate, "being ſigned by 3 or 4 reputable and ſubſtantial Houſe-"keepers, &c, *was* ſufficient." But though the Juſtices had miſtaken the Act, the Court cleared them from any wrong Motive.

But it being ſuggeſted "that the preſent Parſon and "Churchwardens were ready to ſign a Certificate in his Fa-"vour," The Court enlarged the Rule to the firſt Day of next Term; with a view that He might be licenſed at *Michaelmas*, *if* there ſhould be *no other* Objection than what aroſe from the Certificate's not being ſigned by the Parſon and Churchwardens; and the Matter (which ſeemed to have raiſed great Heats, and was ſtrongly ſupported by Sir *John Aſtley*, on the Part of *Day*,) be accommodated.

The RULE was accordingly enlarged in theſe Terms, *viz.* "That the firſt Day of the next Term be farther given "them, to ſhew Cauſe *why they have not granted*, &c."

N. B. By 26 *G.* 2. *c.* 31. §. 1. It is enacted, That upon granting Licenſes by Juſtices of Peace, to any Perſon, to keep an Alehouſe, Inn, &c. Every ſuch Perſon *ſhall enter into a* RECOGNIZANCE in 10*l.* with two ſufficient Sureties, Each in 5*l*; or One ſufficient Surety in 10*l*; under the uſual Condition, "*for maintaining of* GOOD ORDER AND "RULE within the ſame."

By § 2. It is enacted, That *no Licence* to keep the ſame ſhall be granted *to any Perſon* NOT LICENSED *the Year preceding*; UNLESS ſuch Perſon produce, at the General Meeting of the Juſtices in *September*, a CERTIFICATE under the Hands of the *Parſon, Vicar or Curate and the Major Part of the Churchwardens and Overſeers*, OR ELSE *of* 3 *or* 4 *reputable and ſubſtantial Houſekeepers and Inhabitants* of the Pariſh or Place where ſuch Ale-houſe is to be; ſetting forth "That ſuch Perſon is of good Fame, and of ſober Life "* and Converſation." And it ſhall be *mentioned in ſuch Licence*, "That *ſuch Certificate was produced*:" Otherwiſe ſuch Licence ſhall be null and void. * P. 558.

By § 3. No Licence ſhall intitle any Perſon to keep an Alehouſe *in any* OTHER *Place*, than that *in which it was* FIRST *kept*, by Virtue of ſuch Licence: And ſuch Licence, *with regard to* ALL OTHER *Places*, ſhall be null and void.

On *Friday* 18th of *November* 1757. Mr. *Norton* again moved (and moved it as a *new original* Motion) for *an* INFORMATION againſt theſe two Juſtices of Peace; who, he

ſaid, had at their laſt general *September* Meeting for granting Licences, ſtill PERSISTED *in refuſing to grant this Licence*, notwithſtanding what had already paſſed in this Court upon the ſame Subject and Occaſion. Of this Fact he had Affidavits: and he alſo produced *freſh* and *circumſtantial Affidavits*, as to the Merits; *viz.* the Neceſſity of ſuch a Licence, and the Conduct of the Juſtices in their Oppoſition to it.

Lord MANSFIELD—What paſſed before was, "That the "Court did *not* think any thing CRIMINALLY *imputa-* "*ble* to theſe Juſtices." The Court then gave no Opinion as to *obliging* them to grant the Licence: But, on the contrary, expreſsly adjourned the Conſideration of the Reaſons of their Refuſal.

This former Rule was only kept on Foot, *in order to obtain the* MATERIAL END *of it*: But as to the Behaviour of the Juſtices, with regard to the criminal Complaint againſt them, the Court diſcharged them from any Imputation of *Crime* or *arbitrary Intention to oppreſs* the Man.

The COURT therefore now made the *like Rule*, upon theſe FRESH *Affidavits*, as they had made upon the former, and ordered that both Rules ſhould come on *together*.

Sir *Richard Lloyd* (on *Saturday* 11th of *February* 1758.) accordingly ſhewed Cauſe upon both Rules.

He obſerved that it was a Sort of Rule never before granted; and which He had known refuſed 25 Years ago. He ſaid he never knew a Rule made upon Juſtices, to ſhew Cauſe "WHY *they did not grant a Licence*," or *to enforce* them to do ſo; Unleſs there was ſome Charge of Corruption, Partiality, Bias, or other Imputation upon the Juſtices.

Lord MANSFIELD anſwered That the Affidavits upon
* P. 559. which the *Original* Motion was made *did import ſuch a Charge*;—And the Motion was *originally* made *upon that Foot*: And that the Rule was put into its preſent Form, *out of* TENDERNESS *to theſe Gentlemen*, and *Regard* to the Fairneſs of their Character.

And they did indeed, upon the former Cauſe ſhewn, appear to be *free* from Blame, as to any *Criminal* Imputation.

But yet *if* they have *no reaſonable Objection* to the Man, they OUGHT *to licenſe* him: And *if* they *have any Reaſon*, they OUGHT *to* GIVE *it*. For *though* they have, it is true,

a *Diſcretion*

a *Diſcretion* in theſe Caſes, yet it muſt NOT *be permitted* to them to exerciſe an ARBITRARY *and* UNCONTROLED *Power* over the *Rights* of other People, and in Caſes where their *Livelihoods* are ſo eſſentially concerned.

Sir *Richard Lloyd* argued and inſiſted that the Legiſlature has made them the SOLE *Judges*, as being ſuch who, from their Reſidence on the Spot, muſt *beſt know* the Perſons and their Characters, and alſo the Circumſtances of Time and Place. And the Legiſlature has even excluded Juſtices of Peace of *other* Diviſions. And the Juſtices *thus intruſted* have a Right to *judge* FOR THEMSELVES: No Man can judge for another. And *this Power* is truſted to them, by the *Conſtitution*, by the *Legiſlature*.

It may be very *dangerous* to them, to be obliged to *give their Reaſons publickly*: Though they may have *very ſufficient* Ones to ſatisfy their *own* Minds and to direct their *own* Judgment.

And if they are thus intruſted, Why are they liable to be called to an Account by *any other* Juriſdiction; *unleſs* they act faultily and wilfully wrong? Indeed, if they do *wilfully* wrong, let them be puniſhed: But where they act quite conſcientiouſly, they are *not accountable to any Body*.

Now theſe Gentlemen ſay, and they SWEAR too, "that "they *really* judge *this Houſe* to be an IMPROPER HOUSE; "and *this Perſon* to be an IMPROPER PERSON; And that "this is their *real and ſincere Opinion*."

This Queſtion *affects* ALL *the Juſtices in England*: (I mean, *ſetting aſide the* IMPUTATION of *wilful* Miſbehaviour.)

Lord MANSFIELD—Moſt certainly. *No body doubts* of the Thing; *ſetting aſide every degree of Imputation*: It will not bear an Argument.

Sir *Richard* repeated the *Juſtices Reaſons* for their Refuſal; and concluded with INSISTING on their RIGHT to *judge for* THEMSELVES.

* Mr. *Young*, being in Court, ſpoke (very handſomely) in exculpation of himſelf from any ill Intention; and declared very ſolemnly, "that He had acted accord-"ing to his *real Sentiments*, and the *beſt of his Judg-"ment*." * P. 560.

Lord MANSFIELD—It is a Matter of too much Conſequence, and too much Length too (as I am obliged to go away,) to be determined now immediately; And it may as well ſtand over till next Term, as ſo little Time of this Term is left.

ADJOURNED.

On *Thurſday* 13th of *April* 1758. This Caſe being mentioned again—Lord MANSFIELD propoſed *altering the Rule*, by making it "To ſhew Cauſe why there ſhould not be "an INFORMATION againſt them:" For ſo, He ſaid, it was *originally moved*, and this was the *true* and *proper* Foot to argue it upon; (And Mr. *Norton* declared that he propoſed to argue it *upon that* Foot;)—Though in *Tenderneſs* to the Juſtices, and leſt the Country ſhould run away with a Notion of their being under a *Criminal* Charge, it had been put into the Form that it at preſent ſtands in. *(V. ante p.* 557.) And Mr. *Nares*, Counſel for the two Juſtices, not oppoſing or objecting to this Alteration—The Rule was *altered accordingly*.

And now this Affair coming on again, (for the laſt Time;)

Lord MANSFIELD again declared that the Argument ought to be taken up upon the Foot of *Criminality* in the Juſtices: For it was ſo *originally moved*; it was the *proper Nature* of the Queſtion; it was ſo underſtood by every Body; and ſo *meant by the Court*. For, (as He again explicitly declared,) there was no Pretence, upon any *other* Foot, to make a Rule upon the Juſtices, who have a *Diſcretionary* Juriſdiction given them by the Law. But though * DISCRETION does mean, (and can mean Nothing elſe but) *Exerciſing the beſt of their Judgment* upon the Occaſion that calls for it; Yet if this Diſcretion be *wilfully abuſed*, it is *criminal*, and ought to be under the Control of this Court.

* V. poſt. p. 570. a further Definition of Diſcretion.

Mr. *Nares* and Mr. *Thurlow*, for the Defendants thereupon argued ſtrongly and very largely, that the Juſtices had been ſo far from acting *criminally*, that they had acted *rightly*, *properly* and *honeſtly*: And they hinted that the Court had *already* exculpated them from any *Criminality* of Behaviour.

The Legiſlature have left this Juriſdiction *ſo abſolutely* to the Juſtices of the *particular Diviſion*, that *no Appeal* will lie from their Determination; as appears by 1 *Salk.* 45. which is expreſsly ſo, and is cited in 2 *Strange* 881, as a Proof of this Poſition.

* P. 561. * Neither will any *Mandamus* lie to the Juſtices, to oblige them to grant the Licence; even though they ſhould appear to have refuſed it upon Reaſons which may be looked upon as very ſuſpicious at leaſt, if not very improper. 2 *Strange* 881. *(Rex* v. *Juſtices of Worceſter) Giles*'s Caſe.

Nor will the Court grant an *Information*, for refuſing to grant a Licence. *Rex* v *Juſtices of Nottingham*, where, *they ſaid*, an Information was *denied*.

But

But *Per Cur.* That Caſe was an *Abuſe*, a *groſs Abuſe*, of their Diſcretion: And the Information was therefore *granted*. And ſo it was in the Caſe of *Bridgewater*, upon the ſame Foot, of *Abuſe* of the Diſcretion intruſted to them.

The Counſel for the two Juſtices next obſerved that *Day*'s having for many Years had a Licence to keep a public Houſe *in another* Pariſh, was quite an *immaterial* Circumſtance: For, by 26 *G.* 2. *c.* 31. § 3. ſuch Licence was *abſolutely null and void*, with regard to all OTHER Places. [*V. ante* 558.]

The Affidavits on both Sides being then All diſtinctly read, It appeared (upon the whole Matter) that theſe two Juſtices had acted in this Matter with Fairneſs, Impartiality, Candor, and Juſtice; that they *really and ſincerely thought* both the *Man* and the *Houſe* IMPROPER *to be licenſed*; and that they had *very good and ſufficient Reaſons* for ſo thinking and determining.

Whereupon, their Counſel concluded with praying that the Rules made upon them might be diſcharged with *full Coſts*.

Contra, for the Proſecutors, Mr. *Norton &c.* urged their Reaſons for making the Rules abſolute.

The main Tendency of the Arguments of the Counſel *in Support* of theſe Rules, was, to ſhew that the Refuſal to grant this Licence to *Day*, aroſe from PARTIALITY to Mr. *Barker* the Lord of the Manor, who was the Proprietor (the Landlord) of the *other* publick Houſe already eſtabliſhed in the Pariſh.

Lord MANSFIELD once more declared "That this Court "had NO *Power* or Claim, to *review the Reaſons* of Juſtices "of Peace, upon which they form their Judgments in "granting Licences; by way of APPEAL from their "JUDGMENTS, or OVER-RULING *the* DISCRETION *in-* "*truſted to them.*"

But if it CLEARLY *appears* that the Juſtices have been *partially*, *maliciouſly*, or *corruptly* influenced in the EXER- * CISE of this Diſcretion, and have (conſequently) ABUSED * P. 562. *the Truſt* repoſed in them, they are liable to Proſecution by *Indictment* or *Information*; or even, poſſibly, by *Action*, if the Malice be very groſs and injurious.

If their JUDGMENT *is wrong*, yet their HEART *and* INTENTION *pure*, God forbid that they ſhould be puniſhed! And he declared that He ſhould always lean towards *favouring* them; unleſs Partiality, Corruption, or Malice ſhall *clearly* appear.

The

The preſent Queſtion therefore only is, " Whether theſe " Gentlemen have been guilty of any *Partiality* or *Malice*, " (for Corruption is not pretended,) in the Refuſal of this " Licence."

Then He went minutely and accurately through All the Particulars both of the Charge and of the Defence. And he thought that upon the firſt and original Motion, the Juſtices appeared to have been *miſtaken* in the *Grounds* of their Refuſal; in that they fixed it upon the want of the Miniſters and Churchwardens Signing; which *they judged* to be *requiſite* by the 26 *G.* 2. *c.* 31. (when it was *not.*) However, in this, they were *not criminal*; though they were *miſtaken*. And at *that* Time, they had *no* Perſonal Objection to *Day*. And therefore it was (from all that *then* appeared) reaſonable to expect that, upon enlarging the Rule, they *would* at their next Meeting *grant* the Licence; which they had before refuſed, *upon a Miſtake*, of which they were ſubſequently informed.

But SINCE *this*, and antecedent to ſuch next Meeting, there are come out *ſeveral ſtrong* PERSONAL *Objections to* DAY *himſelf*; (Which theſe Juſtices were the PROPER *Judges* of;) Namely, His keeping and having long kept a Houſe for publickly retailing Ale Wine and Spirituous Liquors without being licenſed thereto; His having been twice convicted of ſelling Spirituous Liquors, without a Licence; His ſuffering a Day Labourer to drink a whole Day in his Houſe, in Harveſt-time, and afterwards vindicating it; His having been charged with a Fraud, upon Oath; Beſides an Allegation in One of the Affidavits, " That two notorious " Highwaymen and Robbers appeared at leaſt to have uſed " his Houſe as a Public Houſe, if they enjoyed no other and " more particular kind of Harbour and Protection in it."

And in reſpect to the *Houſe*, the Juſtices now ſwear that they are clearly of *Opinion* " That *One* Houſe is ſufficient." And they likewiſe clear themſelves, by the moſt ſolemn Aſſertions in their Affidavits, of all *Criminal* Imputation.

* P. 563. * Therefore He concluded with declaring it as his Opinion, that there was NO *ſufficient Foundation* for a CRIMINAL Charge againſt theſe Juſtices.

Mr. Juſt. DENISON concurred.

HE alſo expreſly *allowed the Diſcretionary* Power of the Juſtices in granting Licences; *without Appeal* from their Judgments, or having their *juſt* and *honeſt* Reaſons *reviewed* by

by *any* Body. But yet an *improper and unjuſt Exerciſe* of the Diſcretion, He ſaid, *ought* to be under Control.

But it muſt be a CLEAR *and* APPARENT *Partiality*, or *wilful Miſbehaviour*, to induce the Court to grant an Information: *Not* a mere Error in *Judgment*. And here is certainly NO *clear and apparent* Partiality, or *wilful* Miſbehaviour, in theſe Juſtices.

Therefore the Rules ought to be diſcharged.

Mr. Juſt. FOSTER concurred in the *general Principles* before laid down: And He thought that there was no Evidence of Partiality, Malice or Corruption, in the preſent Caſe.

He declared *againſt increaſing* the Number of public Houſes; and gave ſeveral ſtrong Reaſons againſt it: And therefore He thought the Juſtices far from being to blame, in having come to a Reſolution "*not* to increaſe them." And He was ſatisfied that the Juſtices had Reaſon ſufficient to refuſe this *particular* Licence; both with regard to the *Houſe*, and alſo with regard to the *Man* refuſed.

Mr. Juſt. WILMOT concurred.

He was very explicit, that the SOLE *Diſcretion* of granting Licences, is in the JUSTICES *of the Diviſion:* And He moreover gave very good Reaſons why it ſhould be ſo.

And this Point (he obſerved,) is admitted at the Bar.

Then the *Sole Diſcretion being in them*, the RULE is invariable, "that this Court will *never* interpoſe to puniſh a "Juſtice of Peace for a mere *Error in* JUDGMENT."

Therefore, even ſuppoſing them to have been *miſtaken from* Beginning to End, yet there is no ground from any of the Affidavits, to infer any *Partiality*, *Malice*, or *Corruption:* There is not the leaſt *Fact*, whereupon ſufficiently * P. 564. *to* FOUND any ſuch Apprehenſion and Belief even in the Complainants; And the Juſtices themſelves do moſt *ſolemnly* DENY it in *their* Affidavits.

Per Cur. Both RULES DISCHARGED, with *Coſts*.

Lord MANSFIELD—There are *two* diſtinct Reaſons why We ſhould *give* COSTS: One, with regard to the Perſon *complaining*; The Other, with regard to the Perſons *complained of*. For it appears, upon the Affidavits, that

that *Day* (the Perſon complaining) has *perſevered* in keeping this Houſe WITHOUT *a Licence:* And it now appears that the Juſtices who are complained of, have acted both *honeſtly* and *legally* in *refuſing* to grant it, in a Place where there was *already* a Sufficiency.

V. poſt. pa. 653. *Rex.* v. *Athay* Eſq; *M.* 1758. 32 *G.* 2. *B. R.* a like Point: And *Rex* v. *Williams*, *Rex* v. *Davis*, and *Rex* v. *Baylis et al'*; all three in *P.* 1762, 2 *G.* 3. *poſt*, *pa.* 1317, & 1318.

Saturday, 22 April 1758.

Rex *verſ.* Inhabitants of Macclesfield.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, N°. 146. pa. 458.

Monday 24th April, 1758.

* P. 567.

* Rex *verſ.* Epiſcopum Dunelmenſem.

MR. *Willes*, on Behalf of Dr. *Sterne*, Prebendary of the ſecond Stall in the Cathedral Church of *Durham*, moved for a MANDAMUS to the Biſhop, commanding Him to exerciſe his VISITATORIAL *Power* over the *Temporalities* of that Church, in the Inſtance herein after mentioned: (In which Dr. *Sterne* had applied to the Biſhop to exerciſe it; Who refuſed to do ſo, unleſs under the Authority of this Court.)

And He alledged that ſuch Viſitatorial Power is given to the Biſhop, by the 40th of their Statutes.

And there is no other Method of trying this Queſtion, but before the Biſhop as Viſitor.

Mr. *Norton*, for the Biſhop, ſaid that the Biſhop was not ſatisfied that He HAD *ſuch a Power:* And therefore he propoſed that the Dean and Chapter ſhould be called in, to litigate it.

N. B. The Merits of the Queſtion were "Whether the "*Succeſſor*-Prebendary (Dr. *Sterne*) had a Right to 2 "½ Years Profits accruing during the *Vacancy of the* "*Stall*, from the Death of Dr. *Benſon*, Biſhop of "*Glouceſter*, (the laſt preceding Prebendary:) Which "intermediate Profits the *Other* Prebendaries had "received, and *divided* amongſt them."

LORD

Lord Mansfield thought that an *Action at Law* was the *proper Method*; and inſtanced the Caſe of Dr. *Younge* v. *Dr. Lynch*, *P.* 26 *G.* 2. 1753. *B. R.*; and mentioned likewiſe Canon *Seagar*'s Caſe (who was a Canon of the Church of *Saliſbury*) in Chancery.

"Whether the *Biſhop* can have a *Juriſdiction* to determine *this Point*; Or Whether *Matters of Property* in Chathedrals can be determined otherwiſe than according to "the Courſe of the *Law of the Land*, is a great Queſtion." And certainly the Dean and Chapter muſt have an Opportunity to ſhew Cauſe againſt a *Mandamus* being iſſued to the Biſhop, to exerciſe ſuch a Juriſdiction.

* But in this particular Caſe, the Queſtion muſt be litigated, not only with Members of the Body; but with *Executors and Adminiſtrators* of deceaſed Prebendaries: Over *whom*, the Biſhop (*ſuppoſing* Him Viſitor, and as Viſitor to have Conuzance of ſuch a Caſe,) can have no Power. Which *alone* is deciſive againſt his Juriſdiction in this Queſtion. * P. 568.

Mr. *Willes*, perceiving the Court ſo ſtrongly againſt him, agreed to take nothing by his Motion.

Rex *verſ.* Peters, et al'.

O R

Cavil *verſ.* Burnaford et al'.

Mr. *Huſſey* ſhewed Cauſe againſt the iſſuing of a *Mandamus*.

A Motion had been made by Mr. *Whitaker* (on 13th *February* 1758) for a *Mandamus* to be directed to the Defendant *John Peters*, the County-Clerk, (who was the Steward of the Court,) and alſo to the free Suitors of the *County Court* of the County of *Cornwall*, commanding them to *proceed to final Judgment* in a certain Cauſe by Plaint in Replevin, commenced in the ſaid County-Court, between *John Cavil* Plaintiff, and *John Burnaford*, *Anthony Pomery*, and *Nicholas Pelyne*, Defendants; in which Cauſe the ſaid *John Cavil* obtained an *Interlocutory Judgment* in the ſaid County-Court.

The *Caſe*, in ſhort was,—That *Burnaford* diſtrained *Cavil*, for Rent; *Cavil* brought a Replevin, in the County-Court of *Cornwall*; And Interlocutory Judgment *was regularly entered*; And a Writ of Inquiry of Damages executed

executed thereupon; and 2 *d.* aſſeſſed for Damages, and 5 *s.* for Coſts, and ſo much more Coſts as the Court ſhould allow. This *Inquiſition* was ſet aſide for *Irregularity*, (*viz. Want of Notice* of executing the Writ of Inquiry.)

The Defendant's Advocate there then moved "To *ſet* "*aſide* the ſaid (regular) INTERLOCUTORY JUDGMENT *it-* "*ſelf*; UPON *the Defendant's paying the Coſts of entering it*, "(to be taxed by *the* Steward,) *and on avowing iſſuably*:" And afterwards, on a ſubſequent motion "to make ſuch "Rule abſolute," it being urged by the other Side, "that "that Court had no Power to ſet aſide a *regular* Judgment," the Judge took Time to adviſe. At a future Court, after Inquiry from ancient Practiſers in the ſaid Court, and being informed that it had been the *conſtant Cuſtom and Uſage*
• P. 569 *of it* "TO SET ASIDE *interlocutory Judgments, any time* "*before executing Writs of Inquiry therein*, ON *the Defendant's* "*paying the Coſts of entering the ſame Judgments, and plead-* "*ing iſſuably to ſuch Actions inſtanter*;" and after having fully conſidered the Affair in all its Circumſtances; and apprehending it to be agreeable to the Practice of *this* Court; He declared his Opinion "That it *ought to be ſet aſide*, "and the Defendant's Avowry received, they having paid "the Coſts, at the Time of filing it *de benè eſſe*," (which had been done in the Interim:) And accordingly He made a Rule, thus—"*Cavil* v. *Burnaford et al'.* It is *Ordered*, "*&c*, That the interlocutory Judgment entered in this "Cauſe *be* SET ASIDE, on Payment of Coſts taxed; And "that the Avowry filed in this Cauſe, *de benè eſſe*, laſt Court- "Day, be now, on Conſideration of the Court, made abſo- "lute: And therefore Rule for the Plaintiff in Replevin to "Plead in Bar to the Avowry."

And the Judge of this inferior Court ſwears "That He "acted with the utmoſt Impartiality in the Affair, and ac- "cording to the beſt of his Judgment and Underſtanding; "And, He apprehends and believes, according to the CON- "STANT USAGE AND PRACTICE *eſtabliſhed and obſerved* "*in the ſaid Court*."

Mr. *Whitaker*'s Motion was grounded upon the *Inferior Judge*'s having *exceeded his Authority*. And He had cited 2 *Strange* 823. *Fox* v. *Glaſs*, *H.* 1728. 2 *G.* 2. as the *firſt* Time that even *this Court* had ſet aſide REGULAR Judgments; and 1 *Strange* 392. *Bayly* v. *Boorne*, *M.* 7 *G.* 2. where they doubted of an *Inferior* Judge's having ſuch a Power.

On *Friday* laſt, (21ſt *April* 1758,) Mr. *Huſſey* ſhewed Cauſe Why this *Mandamus* ſhould not iſſue. And He made the two following Queſtions.

1ſt. Whe-

1ſt. Whether the Judge or Steward of an *inferior Court* has a Right to SET ASIDE *interlocutory Judgments* REGULARLY obtained:

2d. Whether in *this particular Caſe*, the Steward of *this* inferior Court had a Right to do as he had done, and as is the Practice of that inferior Court.

As to the 1ſt Queſtion—He agreed they *cannot* grant *new Trials*. 1 *Salk.* 201. *Regina* v. *Hill et al'*, and 2 *Salk.* 650. the Caſe of *Briſtol* (which is S. C.) *Brooke* v. *Ewers et al'*, 1 *Strange* 113. S. P. A *Mandamus* iſſued to a Judge of an inferior Court, "to give Judgment;" *though* he had granted a new Trial. Therefore he would not contend that an inferior Court has a Right to ſet aſide a *regular* Judgment, UNLESS it be to let in the *Merits*.

*But they *may* do it *in order to* TRY THE MERITS. * P. 570.
2 *Salk.* 650. In the Caſe of the Mayor and Aldermen of *Briſtol*, It was holden, "That an *inferior* Court could not "grant a *new Trial*." However, it was long ſince done by *this* Court: And they would alſo *formerly* ſet aſide *regular Judgments*, on putting the Plaintiff in as good Condition as before. And it does not appear how the Court came to leave it off; as Sir *John Strange* ſays (in the Caſe of *Fox* v. *Glaſs*) that they had done.

And it ſeems right in itſelf, and agreeable to natural Juſtice, to permit inferior Courts to ſet aſide regular *interlocutory* Judgments, in Order *to let in a Trial of the* MERITS. Indeed it is reaſonable, *not* to permit them to ſet aſide the *Verdicts of* JURIES: Which is an exceedingly different Caſe from a Judgment by Default.

As to the 2d Queſtion—In the *preſent* Caſe, the Steward acted rightly and reaſonably, upon the Circumſtances attending it.

Mr. *Whitaker*, *contra*, for the *Mandamus*.

The *Letting in the Trial of the* MERITS, makes *no Difference*. I ſay that an Inferior Court can *not* ſet aſide a *regular* Judgment after they have *once exerciſed their Authority*. In 1 *Strange* 392. *Baily* v. *Boorne*, *M.* 7 *G.* 2. *B. R.* The Court thought it a Queſtion that deſerved Conſideration, "Whether the Judge of an Inferior Court *could* do it" And there is no more Reaſon Why they ſhould have *this* Power, than that of ſetting aſide *Verdicts*. They have no ſuch *Diſcretion*. "*Diſcretion*" *is another Word for* "*Arbi-*"*trary Will*."

LORD

Lord Mansfield denied this Interpretation of the Term *Diſcretion*; and referred to what was ſaid (a few Days ago) in the Caſe *Rex* v. *Young* and *Pitts*, *V. ante p.* 560, 561, and 562.) And he ſaid that Discretion is, as Lord *Coke* ſays, "diſcernere *per Legem*, quid ſit juſtum."

To which Obſervation, Mr. Juſt. Wilmot deſired to add another, from 5 *Co.* 100. *a. Rooke's* Caſe: "Discre-"tion is a Science and Underſtanding of diſtinguiſh-"ing and diſcerning between Falſehood and Truth, "*&c &c*; and not to do according to *arbitrary Will* "and *private Affection*."

Mr. Whitaker—But theſe Inferior Judges have *no Sort* of diſcretionary Power of *any Kind*.

Lord Mansfield—That Caſe of *Baily* v. *Boorne*, in 1 *Strange* 392, only ſays "That it was a Queſtion that de-
*P. 571. "*ſerved *Conſideration*." But there is *no Precedent or Authority* to the contrary of their having ſuch a Power.

And it ſeems a Power *neceſſary to the Exerciſe of Judicature*; And is very different from the Caſe of ſetting aſide Verdicts—*This* Power to ſet aſide *interlocutory* Judgments, ſeems *incident to Juſtice*.

*Mr. Juſt. *Foſter* was abſent.

However, both Lord *Mansfield* and the other * two Judges, thought it might not be amiſs to look into it. And—

Mr. Juſt. Denison intimated as if there was ſomething of this Sort before the Court, in † *P.* 28 *G.* 2. *B. R.*

[† It was in *Hill*, 1754. 27. and *P.* 1755. 28 *G.* 2. *Eaſtwell* v. *Livermore*: *V. poſt.* 572.]

Cur' adviſare vult.

And now Lord *Mansfield* delivered the Opinion of the Court; having firſt deſired Mr. *Huſſey* to ſtate the Caſe, for the Sake of the Students: And He took this Opportunity of obſerving and declaring "that Nothing *miſleads* ſo "much as reporting the Determination of Courts of Juſtice "without having a ſufficient and *correct State of the Caſe*;" which, He ſaid, was only an *ignis fatuus*, leading People into *Error* and *Miſtake*.

Here, the *Queſtion*, upon the *true* State of the Caſe, (which *V. ante*, *p.* 568.) appears to be "Whether an In-"ferior *Court* has Power *to* set aside *a* regular "interlocutory *Judgment*, *in* Order *to let in the Trial* "*of the* Merits."

And

And We are All of Us of Opinion, "That they HAVE "ſuch a Power." There is no *Authority* nor *even Dictum*, to the *contrary:* Nor is there any *Reaſon* why they ſhould not have ſuch a Power; which is *incident* to the Doing of *Juſtice.*

Indeed there *are* Authorities which ſay, "That an Infe- "rior Court can *not grant a* NEW TRIAL, or *ſet aſide the* "VERDICT *of a* JURY, but for Irregularity."

But there may be many Reaſons Why they may be permitted to ſet aſide an *interlocutory* Judgment, *in order* to let in the *Merits*; which Reaſons will not hold ſo far as to make it allowable for them to ſet aſide the *Verdict of a Jury:* (One of which Reaſons may be "that *no Attaint* lies upon "a Verdict given in an *inferior* Court.") And indeed the Setting aſide a *Verdict of a* JURY, is too great a Power to be intruſted to an *inferior* Juriſdiction. Yet

We are, All of Us, clearly of Opinion "That they *may* "ſet aſide *regular* INTERLOCUTORY Judgments, *in Order* "* to let in the *Merits:*" both upon the *Reaſon* of the Thing, and for the *Convenience* attending it. * P. 572.

That Caſe in 1 *Strange* 392. of *Baily* v. *Boorne* (*V. ante p.* 570.) proves nothing at all againſt this. And in 1 *Strange* 499. *Jewell* v. *Hill*, *H.* 8 *G.* 1. An inferior Judge ſet aſide *even a Verdict*, for *Irregularity*, (or rather for *Surprize*;) Which this Court allowed he might do.

Mr. Juſt. DENISON added, that in the Caſe of *Eaſtwell* v. *Livermore*, (*V. ante p.* 571. *in Margine*) It ſeemed to be underſtood and agreed at the Bar, "That an inferior Court "could not ſet aſide a Verdict, * AT ALL:" But He finds that He has written a Note, at the Bottom of that Caſe, importing that *He Himſelf* thought that it ought not be taken for granted, *ſo generally* as this is laid down, "That they "cannot do it * *at all*;" For that He thought that an Inferior Court *may* ſet aſide *even a Verdict*, *for* IRREGULARITY; though they are not to be truſted with a Power of Setting aſide *Verdicts upon the* MERITS.

* It is true that there was no Diſtinction expreſſed, in the Diſcuſſion of that Caſe. But no Irregularity was there pretended: nor any *other Reaſon* attempted to be given for ſetting aſide that Verdict, *but* becauſe it was a *hard* One, and ſuch as *ought* to be ſet aſide.

And *this*, He ſaid, was certainly the RIGHT *Diſtinction*; *viz.* That they *may* ſet aſide even Verdicts, *for Irregularity*; but *not* upon the Merits.

Where-

Wherefore *Per Cur.* unanimouſly,

Let the Rule be made "That *John Peters* the County-"Clerk, and the Free Suitors of the County-Court, "ſhould ſhew Cauſe why a *Mandamus* ſhould not iſ-"ſue directed to them, commanding them to proceed "to final Judgment in a certain Cauſe by Plaint in Re-"plevin commenced in the ſaid County-Court, be-"tween *John Cavil*, Plaintiff, and *John Burnaford*, "*Anthony Pomery*, and *Nicholas Pelyne*, Defendants, "in which ſaid Cauſe the ſaid *John Cavil* obtained an "interlocutory Judgment in the ſaid County-Court, "on the 12th Day of *October* laſt;"—*be* DISCHARGED.

RULE DISCHARGED.

*P. 573. * Rex *verſ.* Collingwood Foſter, Edward Gallon, George Selby, and Thomas Mills.

FOUR Rules having been made abſolute, (laſt *Tueſday,*) for four Informations in Nature of *Quo Warranto*, againſt theſe 4 Defendants, reſpectively, "to ſhew by what "Authority they claimed to be Chamberlains of *Alnwick* "in the County of *Northumberland*—"

Sir *Richard Lloyd*, on Behalf of the Defendants, moved (on *Saturday* laſt,) That there ſhould be ONLY *One* Information againſt All the four Defendants, inſtead of FOUR *diſtinct and ſeparate* Informations.

Which The COURT thought very *reaſonable*, upon the 4th Section of 9 *Ann. c.* 20. which runs thus—"And if it "ſhall appear to the ſaid reſpective Courts, That the *ſeve-*"*ral Rights* of *divers* Perſons, to the ſaid Offices or Fran-"chiſes, *may properly* be determined on ONE Information, "It ſhall and may be lawful for the ſaid reſpective Courts "to give *Leave* to exhibit ONE ſuch Information againſt "SEVERAL Perſons, in order to try their *reſpective* Rights "to ſuch Offices or Franchiſes."

Mr. *Norton contra*, for the Proſecution, urged that though the Court *might* indeed *give Leave* for this joining ſeveral Perſons Rights in One Information, yet they *would not do ſo*, if the Proſecutor judged that it might be *inconvenient* to him.

Sir

Sir *Richard* replied that the Court *would* direct, unleſs it was *ſhewn* to be attended with Inconvenience.

It ended in Mr. *Norton*'s taking Time to conſult his Client.

Which having done, He (this Day) ſaid his Client had no Objection to it; provided no Exception ſhould be afterwards taken to ſuch Union of the ſeveral Cauſes.

CUR. The Defendants cannot object to it, when the Court judge it to be proper.

* Challoner *verſ.* Walker. * P. 574.

Tueſday, 25th April 1758.

AN Action of Debt on a Bond, Conditioned as follows; after firſt reciting That whereas *G. Needham* being ſeiſed in Fee &c, died inteſtate &c, leaving a Son *James* &c and *Anne Needham his Widow* then living; And whereas *James* &c were about to ſell the Eſtate; And alſo reciting the ſaid *Anne*'s being married to a ſecond Huſband *David Kinneir*; And reciting a *Doubt* having ariſen concerning *her Right to Dower*; And whereas it was agreed that 30 *l.* Part of the Purchaſe-Money of the Eſtate, ſhould be left in the Defendant's Hands, in order to indemnify &c from the ſaid Claim &c, And all Coſts Charges &c: Then the Condition is, that if the Defendant and one *Coulſon* or their Heirs Executors and Adminiſtrators ſhould indemnify the Plaintiff from all and all Manner of Claim of Dower that might be made BY *ſaid Anne Needham*, as Widow of the ſaid *G. Needham*, out of the ſaid Premiſſes; and of and from all Coſts Charges Damages Demands &c, that may ariſe or happen by or from ſuch Claim &c; then &c.

Plea. That he has indemnified the Plaintiff.

Replication that *David Kinneir* married the Widow; and exhibited a Bill in Chancery for Arrears of Dower—He anſwered the Bill; and expended 8 *l.* 10 *s.* for Coſts in the ſaid Suit.

To this Replication, the Defendant demurs ſpecially; and ſhews ſeveral Cauſes of Demurrer; *viz.*

1ſt. The Replication, is *not a direct Anſwer* to the Plea.

2d. *No Iſſue can be taken* upon this Replication.

3d.

3d. *No Breach* of Condition is *ſufficiently alledged* in this Replication.

Mr. *Altham* for the Defendant made two Points:

1ſt. Point. The Condition only extends to a Claim of Dower to be made by *Anne Needham in her* LIFE-*time.*

2d. The Plaintiff has *brought his Action too ſoon:* He ought to have ſtayed *till* the Suit in Chancery had *been determined.*

Firſt Point—Conditions ſhall be conſtrued *favourably* for *Obligers.* 1 *Saund.* 66. *Butler* v. *Wigge*—It is ſo declared
* P. 575. * by the Court. *Cro. Eliz.* 396. *Greningham* v. *Ewer*—There the ſame Rule was laid down. 2. *Saund.* 411. *Ld. Arlington* v. *Merricke.*

And a Condition ſhall *not be extended* further than the *Words* of it. 1 *Ro. Abr.* 489. 1 *Ro. Abr.* 426. *pl.* 6. 1 *Strange* 227. *Stibbs* v. *Clough.* 1 *Lutw.* 536. *Wilſon* v. *Conſtable.*

Second Point—His Expence will be *repaid him*, if the Bill ſhould be diſmiſſed with Coſts. It is not like the Payment of a Debt admitted to be due: *This* Condition is only to indemnify againſt a *Claim.*

Mr. *Aſhurſt* for the Plaintiff.

1ſt Point. 1ſt. This Breach is within the *Words* and *Letter* of the Condition.

2d. It is clearly within the *Meaning of it.*

Firſt—*Aſhurſt* and *Walker* purchaſed the Eſtate. The Widow had *claimed* Dower. The Indemnification is againſt any *Claim* of Dower that ſhould be made by her. And the Suit is brought upon that *Claim.*

Secondly—But it is clearly within the *Intent* of the Condition. And Mr. *Altham*'s Caſes will not hold now: Becauſe Courts of Equity will now relieve againſt the Penalty. And Courts of Law therefore are leſs ſtrict than formerly. *M.* 29 *G.* 2. *B. R. Drummond et Ux' Adminiſtratrix of Aſh Eſq*; v. *Duke of Bolton.*

In the preſent Caſe, there was a Treaty for the Sale of the Eſtate: And a Bond (inſtead of incumbering the Deed with

with a Covenant) to indemnify againſt all *Claim* of Dower, and all *Expences Coſts* and *Damages* ariſing *from any ſuch Claim.* Mr. *Altham*'s Caſes of 1 *Ro. Abr.* 326, *&c*, are not applicable to the preſent Caſe.

2d Point—The Plaintiff is certainly *already* damnified: And he is *not* obliged to *wait* for Reimburſements, *till* a Chancery-Suit ſhall be determined. Nor can he have *Intereſt* for his Money, if he was to wait till then. 1 *Ventr.* 33, 36 & 78. *King* v. *Atkins.*

Mr. *Altham* in Reply—

1ſt Point. The Condition is "To ſave him harmleſs "from the Dower or Thirds that are or ſhall be claimed BY "*Anne Needham*, and from all Coſts Charges Damages *&c.* "ariſing *&c therefrom*:" That is, from *her* Claim.

* 2d Point—In 1 *Ventr.* 35, 36, 78. The Shilling was an abſolute Damnification: For there no Coſts were recoverable, upon the *Scire facias* iſſued againſt *King*, to which He was obliged to appear. * P. 576.

LORD MANSFIELD—This is the plaineſt Caſe that can come before a Court. He ſtated the Pleadings. And He treated the Objections, and the Caſes cited in Support of them, (and thus applied to them,) as quite frivolous and nugatory; And, without the leaſt Doubt or Difficulty, over-ruled them. For the Caſe is more clearly *within* the Words and Meaning of the Condition: And the Obligee has been *already* damnified, and therefore has a Right to be *immediately* reimburſed.

Mr. Juſt. DENISON concurred in both. And He added that there was 30 *l.* left in the Purchaſer's Hands to indemnify the Plaintiff: And the Indemnification is againſt the *Claim*, and all Conſequences of it. The Obligee has nothing to do with the *Claimant's Right*: It is enough, that he is damnified by the *Claim.* And he is not to ſtay *till* the Determination of the Suit: He has an *immediate* Right to be reimburſed.

Mr. Juſt. FOSTER and Mr. Juſt. WILMOT were clearly of the ſame Opinion: And Both of them explicitly declared themſelves to the above Effect.

JUDGMENT for the PLAINTIFF.

Rex *verſ.* Inhabitants of the Tything of Milland.

ON ſhewing Cauſe againſt quaſhing two Orders, *viz.* An Original Order of two Juſtices, made for *taxing rating and aſſeſſing* the Inhabitants of the TYTHING of *Milland*, in AID of the Pariſh of *St. Peter's Cheeſehill* in the *ſame County*; and the Order of Seſſions confirming it;

The Queſtion was, Whether it was ſufficiently ſtated "That Both theſe Places (*viz. Milland* and *St. Peter's*) "lie WITHIN *the* SAME HUNDRED:" Which is a Circumſtance eſſentially neceſſary to be aſcertained, in order to give the Two Juſtices any *Juriſdiction* in the Caſe.

For, by 43 *Eliz. c.* 2. § 3. Power is given to Two Juſtices, in Caſes where they perceive a Pariſh not to be able to maintain its own Poor, "to tax any other Pariſh *within* "the HUNDRED where the Pariſh is:" [Which is all the * P. 577. * Authority given to Two Juſtices.] Then the Act goes on, further, "And if the ſaid Hundred is not able, then "the SESSIONS ſhall aſſeſs any other Pariſh within the "County."

Now it is here only ſtated "That the Tything of *Mil-* "*land* and the Pariſh of *St. Peter's Cheeſehill* Both lie in "the *ſame* LIBERTY *of the Soke*, where the ſaid Pariſh lies."

It was therefore objected That *non conſtat* that they are within the ſame HUNDRED: For "*Liberty*" and "*Soke*" are Words of vague, indeterminate Meaning, not equivalent to the known legal Term "Hundred," nor co-extenſive with it; And perhaps the Liberty may extend into *ſeveral* Hundreds. However, it is plain that the *Two* Juſtices have *not ſhewn* that they have Juriſdiction: And the Court can't *intend* that they have any.

In Support of the Objection, were cited the following Caſes; *viz. Foley's Laws relating to the Poor* 31. (or 42 in 3d Edition,) *St. Benedict Pariſh* v. *St. Stephen's and St. Mary Magdalen's in Norwich. Reports temp. Qu. Ann.* 269. S. C. *Viner*, Title *Poor*, *pa.* 416. S. C. with *Foley* 31.

The COURT thought it beſt, to ſend it back to the Seſſions, in order to have the Matter better explained and more particularly ſtated.

But

But they did not think themſelves bound down by the *particular Word* "HUNDRED," which is the Term uſed in the Act, ſo as to be confined to this ſingle *Species of Diviſion* of Counties. For if ſuch Diviſion be called by any *other* Term or Name ſynonymous or *equivalent* to that of "*Hundred*," it muſt be equally within the Intention of the Act, and the Court may adjudge according to ſuch *Intention*.

And now, the Caſe having been newly and particularly ſtated,

Mr. *Gould*, who was for the Orders, prayed the Opinion of the Court.

And Mr. *Norton*, who was againſt them, candidly owning That as the Facts are *now* ſtated, He could not contend but that it does appear *(ſubſtantially)* to be a Hundred, though the Diviſion was called by another Name;

The COURT diſcharged the Rule, and affirmed the Orders.

BOTH ORDERS AFFIRMED.

* Johnſon *verſ.* Houlditch.

* P. 578.

Wedneſday, 26th April 1758.

IN an Action upon the Caſe for the Uſe and Occupation of a Houſe, the Defendant had, in *Hilary* Term laſt, obtained the Common Rule, for Liberty "To pay 2*l.* 5*s.* "into Court, and to have it ſtruck out of the Declaration, "ON *Payment of Coſts*." The Plaintiff's Attorney applied to get theſe Coſts taxed, and take the Money out of Court. Upon and after which Application;

Mr. *Whitaker*, for the Defendant, had moved (in the Beginning of this Term) to diſcharge this Rule ſo far as related to the *Coſts*; and alſo that the PLAINTIFF ſhould pay the Coſts of the Suit itſelf, and alſo the *Coſts* of that Application: For that the Plaintiff had the very ſame Offer of the very ſame Sum, before the Judge.

The Caſe he went upon, (and from whence he argued the Plaintiff's Conduct to be oppreſſive) was as follows—A Quarter's Rent (amounting to 2*l.* 5*s.*) and Nothing more, was due from the Defendant to the Plaintiff. The Defendant was *always ready to have paid it:* But the Plaintiff kept out of the Way in order to *prevent* a Tender; and yet brought this Action as above ſtated, by Bill returnable

turnable laſt Term. The Defendant ſummoned the Plaintiff before a Judge, to ſhew Cauſe "Why, upon Payment "of the DEBT *and Coſts*, proceedings ſhould not be ſtay-"ed." The Plaintiff's Attorney Pretended that the Plaintiff had *other* Demands, and therefore refuſed to take the 2*l.* 5*s.* and Coſts. And ſo the Judge was precluded by this Allegation, from interfering; and could make no Order. This *obliged* the Defendant to apply to the Court, for the Common Rule, "To pay the 2*l.* 5*s.* into Court, "with the Coſts then incurred:" (*After which*, if the Plaintiff proceeds, it is at his Peril)

But as this Common Rule is always made upon the Terms of the *Defendant's paying* COSTS *to the Plaintiff*; Mr. *Whitaker*'s Motion made as abovementioned, was "To ſet "aſide *ſo much* of the ſaid Rule as put upon the Defendant "thoſe Terms of PAYING *Coſts* to the Plaintiff:" And he had even added to this Motion, "That, on the contrary, "the *Plaintiff* ſhould pay the Coſts of the Suit itſelf, and "alſo of that Application, TO *the* DEFENDANT;" It being moſt manifeſt that the Plaintiff was determined to *oppreſs* the Defendant as it now appeared that only this 2*l.* 5*s.* was really due to him.

Mr. *Norton*, on Behalf of the Plaintiff, now ſhewed Cauſe againſt Mr. *Whitaker's* Rule. And

* P. 579. * He inſiſted, that *however oppreſſive* this Action might appear, Yet the Plaintiff had, *by Law*, A RIGHT *to bring it:* And conſequently, he was INTITLED *to his Coſts of Suit*, to be taxed and paid to him, upon the Defendant's obtaining this Rule, under the * Statute, which gives Liberty to pay "the Rent due into the Court:" For thoſe are the *Terms* PRESCRIBED *by* that Act.

* I take theſe Rules to be diſcretionary, and founded upon the Courſe and Practice of the Court; not upon any particular Statute.

But

The COURT, upon full Conſideration of the Matter, looked upon theſe Proceedings thus carried on by the Plaintiff, to be *oppreſſive:* And therefore they did DISCHARGE *ſo much* of the above-mentioned Rule as directed the *Payment of Coſts* by the Defendant to the Plaintiff.

The Rule now made was this; *viz.*

"It is ORDERED that the ſaid Rule [made in this Cauſe "on *Wedneſday* next after three Weeks from *Eaſter*-"Day in this ſame Term] be DISCHARGED: And alſo "that *ſo much* of the Rule made in this Cauſe in the "laſt *Hilary* Term, for the Payment of 2*l.* 5*s* into "Court, *as relates to the Payment of* COSTS *to be taxed* by Mr. *Clarke*, be DISCHARGED."

Hutchins

Hutchins *verſ.* Chambers et al'.

Friday, 20th April 1758.

THIS was a Special Caſe from *Surrey* Aſſizes, before, L.d. Ch. J. *Willes.*

It was an Action of *Treſpaſs* againſt the *Juſtices of Peace*, the *Pariſh Officers*, the *Conſtables*, and their *Aſſiſtants*; for executing a *Warrant of* DISTRESS made by the two Juſtices, *upon a Poor-Rate* amounting to 13 *l.* 2 *s.* And a Verdict was found for the Plaintiff againſt ALL the Defendants, ſubject to the Opinion of the Court upon the whole Matter.

The Diſtreſs at firſt taken, was 5 Geldings, ſtated to be *Beaſts of the Plough and Cart*; with their Halters. Which firſt Diſtreſs not being ſufficient, they diſtrained a *ſecond Time*, under the SAME *Warrant:* and took 3 *other Geldings*, which were and are ſtated to have been *alſo Beaſts of the Plough and Cart*, of the Value of 36 *l.* 17 *s.* with their Halters. It is expreſsly ſtated, "That upon the *former* Diſ-"treſs, *there* WERE OTHER *Goods &c*, more than ſufficient "to anſwer the Value of the Demand, beſides theſe Beaſts "of the Plough and Cart."

* This Caſe was firſt argued on *Tueſday* the 31ſt of *January* 1758, by Mr. *Knowler* for the Plaintiff, and Mr. *Gould* for the Defendants; And again, on *Friday* the 14th of *April* 1758, by Mr. *Stowe* for the Plaintiff, and Mr. *Williams* for the Defendants. * P. 580.

There were 5 Queſtions ſtated for the Opinion of the Court, *viz.*

1ſt. Whether the *Rate and Aſſeſſment* was a *good and ſufficient Rate and Aſſeſſment*, in Point of Law: And if not, then Whether the Plaintiff *can avail Himſelf* of any Objection to it.

2d Queſtion. Whether the *Warrant ought to have fixed and* LIMITED *the* TIME * WITHIN WHICH *the Geldings* and Goods diſtrained were to be *ſold:* And whether *for want thereof*, the *Warrant is* VOID, and the *Defendants*, or *any*, and which of them, are *Treſpaſſers.* * V 27 G. 2. c. 20. and 17 G. 2. c. 38.

3d Queſtion. Whether the SECOND *Diſtreſs* is at all *juſtifiable.*

4th Queſtion. Whether the Geldings, being *Beaſts of the* PLOUGH, and uſed by the Plaintiff, BOTH *for the Plough* AND *Cart*, were LIABLE to be taken and *diſtrained* FOR *the ſaid* RATE *and* ASSESSMENT.

5th

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1ſt. Whether the *Rate and Aſſeſſment* was a *good and ſufficient Rate and Aſſeſſment*, in Point of Law: And if not, then Whether the Plaintiff *can avail Himſelf* of any Objection to it.

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4th Queſtion. Whether the Geldings, being *Beaſts of the* PLOUGH, and uſed by the Plaintiff, BOTH *for the Plough* AND *Cart*, were LIABLE to be taken and *diſtrained* FOR *the ſaid* RATE *and* ASSESSMENT.

5th

5th Queſtion. Whether, upon the whole State of the Caſe, the Plaintiff's *Action is maintainable againſt the Defendants*, or *any*, and *which* of them.

And a 6th Queſtion, " Whether the 2d Diſtreſs was not " *exceſſive*," aroſe upon the Argument.

After the firſt Argument, (in which, the Diſtreſs was treated as a *Common-Law* Diſtreſs; and Mr. *Knowler* expreſsly denied it to be an Execution, becauſe it was repleviable; and inſiſted that the Statute *de diſtrictione Scaccarij* is general, is declaratory of the Common Law, and extends to *all* Diſtreſſes for any Cauſe whatſoever;)

Lord MANSFIELD, finding that the Parties propoſed ſpeaking to it again, took Notice That All about the *Rates* is clearly out of the preſent Caſe: For *if* THEY *are bad* the Parties who thought themſelves aggrieved, *ſhould have* APPEALED.

So All about the *Warrants* may be laid out of the Caſe. For the Warrant is not void, ſo as to make it a Treſpaſs *ab initio*.

* P. 581. * Therefore the future Argument may be confined to the other Objections.

ULTERIUS CONCILIUM.

Mr. *Stowe*, who argued for the Plaintiff, on *Friday* the 14th of *April* 1758, paſſed over 1ſt and 2d Queſtions, upon what the Court had intimated after the former Argument; and proceeded directly to the 3d Queſtion.

3d Queſtion. 3d Queſtion. It is ſtated that here was ſufficient Diſtreſs, the firſt Time: And therefore the *Second* was NOT *juſtifiable*. *Co. Lit.* 272. *b. Cro. Eliz.* 13. *Moore* 7. 2 *Lutw.* 1532. *Wallis* v. *Savill. Fitz-H. N. B.* Title *Recaption*. 8 *Co.* 50. *Jehu Webb's* Caſe. And this is a Duty of a *leſs* Nature than Rent: And yet even in *that* Caſe, a double Diſtreſs is unlawful.

A ſecond Reaſon why the SECOND *Diſtreſs* was not good nor juſtifiable, is becauſe the Warrant is NOT *an* AUTHORITY to take it: For, the Warrant *having been* ONCE *executed*, had PERFORMED *its Office*; and conſequently was no more than a Piece of waſte Paper, at the *Time of Taking* the ſecond Diſtreſs.

4th Queſtion. 4th Queſtion. Beaſts of the *Plough* (though uſed both for Plough *and Cart*) cannot be diſtrained for a *Rate*, when there are other Goods ſufficient. 51 *H.* 3. *Stat.* 4. de diſtrictione Scaccarij. " None ſhall be diſtrained by his *Beaſts* " *that*

" *that gaigne his Land,* nor by his *Sheep &c.*" 2 *Inſt.* 133. is large and expreſs, " That this was ſo by the Com-" mon and Civil Law; and that this Statute *extends to* " ALL *Sorts of Diſtreſſes* whatſoever; alſo to all Manner of " *Executions* as well at the Suit of the King, as of the " Subject." *Dyer* 312.

The Words " *levy the Debt*" can not be applicable *merely* to Lord and Tenant; but are *general,* and extends to *all* Diſtreſſes whatſoever. 1 *Inſt.* 289. *b.* 2. *Inſt.* 133.

6th Queſtion. " Whether the ſecond Diſtreſs is not EX-" CESSIVE." 6th Queſtion.

He argued that this Diſtreſs was EXCESSIVE; being a Diſtreſs taken of 3 Geldings, of *triple* the Value: For the Value was 36 *l.* 17 *s.* 0 *d.* and the Sum diſtrained for, only $\frac{1}{3}$ (or very little more) of that Sum, *viz.* 13 *l.* 2 *s.* which is exceſſive upon the Face of it. And he cited 1 *Roll. Abr.* 674: Where Inſtances are given of Diſtreſſes exceſſive upon the Face of them. 1 *Inſt.* 107.

And this Diſtreſs is NOT *an entire Diſtreſs:* but a Diſtreſs of 3 *diſtinct* Things. And an exceſſive Diſtreſs of *ſe-veral Diſtinct* Things is not maintainable: And an Action * of *Treſpaſs will lie* for it. *H.* 28 *G.* 2. *Moir* v. *Munday et al'* which was a Diſtreſs of a great Quantity of Pedlar's Goods (of the Value of 100 *l.*) which might have been ſe-vered; for only 6 *s.* 8 *d.* Therefore both the firſt and the ſecond Diſtreſs are illegal. * P. 582.

Wherefore he prayed Judgment for the Plaintiff.

Mr. *Williams—contra,* for the Defendants.

He confined Himſelf to theſe 3 Queſtions, *viz.* Firſt. Whether under the Statute of 43 *Eliz. Averia Carucæ* can be diſtrained for the *Poors Rate,* where there is other ſuffi-cient Diſtreſs 2dly. Whether under the Warrant for levying the Sum aſſeſſed, a *Second* Diſtreſs can be made, where the Firſt is deficient, and a ſufficient Diſtreſs might have been taken in the firſt Inſtance. 3dly. If a Second Diſtreſs *can* be made; Whether the Second Diſtreſs is not *exceſſive,* and, whether, on *that* Account, *this* Action can be maintained.

And he obſerved, That the *two Juſtices* are *not concerned* in theſe preſent Queſtions, now remaining before the Court. He obſerved likewiſe, that the Firſt Diſtreſs's being a Treſpaſs or not, depended entirely upon the Firſt of his three

three Queſtions; and the ſecond Diſtreſs's being a Treſpaſs or not, depended entirely upon the two laſt of them: and all the three Queſtions depended principally upon the Statute of 43 *Eliz.*

4th Original Queſtion; (Mr. *Williams's* 1ſt.)

He begun with his own firſt Queſtion, (which was the 4th Original Queſtion:) And He firſt conſidered the Nature of the *Duty* created by the 43d of *Elizabeth*, and then the Nature of the *Remedy* thereby given for the Recovery of that Duty.

The *Duty* is *not* a Tax upon the *Land*, nor payable out of it; but a Charge upon the *Perſon*: And it is a Tax throughout the Kingdom, and for *public Benefit*. This is *not* to be conſidered upon the Foot of a COMMON LAW *Diſtreſs*: The Nature, Deſign, and End of this public Duty required the moſt effectual and ſpeedy Remedy that could be deviſed.

The Reaſon why Beaſts of the Plough could not be diſtrained at *Common Law*, will not hold in the preſent Caſe.

This is ſimilar to an Execution, and eſſentially different from a Diſtreſs at Common Law.

At *Common Law* the Diſtreſs *could not be ſold*: It was only taken *nomine pœnæ*; not as a *Satisfaction*, (which this is,) for the Duty.

* P. 583.

* The REASONS of the Privilege *do not now hold*. Agriculture *then* wanted and required Encouragement, and muſt have been impeded by a Common-Law Diſtreſs. *Now*, it does not. *Then*, the Thing diſtrained could not be ſold; and remain uſeleſs: *Now*, it may be ſold. The Debt, there, was of a *private* Nature: This here, is of a *public* Nature.

This Diſtreſs is *not* taken as a Pledge, or as a *Mean to compel*; but for a *Satisfaction* for the Duty itſelf, a perſonal Duty, and of a public Nature.

1 *Lord Raym.* 386. *Vinkenſterne* v. *Ebden*. *Sir T. Raym.* 332, *Prideaux* v. *Warne*. 2 *Lev.* 96. S. C. *Cro. Eliz.* 710. *Smith* v. *Shepheard*, prove that the Rule is not applicable to Diſtreſſes for *ſuch* Duties. They are Preſcriptions for Toll-through: And the firſt and laſt are Inſtances of *Sheep &c*, taken for *Tolls*.

As to the Statute de Diſtrictione Scaccarij—Comparing that Statute with the Statute of Articuli ſuper Chartas, 28 *Ed.* 1. *c.* 12. (which refers to the Stat. de Diſtrictione Scaccarij,) and attending to the Words of it, It can never be

be taken to *extend* to ſuch Caſes as the preſent; to Parliamentary Remedies, at that Time unknown. It is confined to ſuch Diſtreſſes as ſhould be *ſold*; to Caſes of the Grantees of the Crown, or where the *Prerogative of the Crown* was concerned. * The Miſchief, at that Time, was the unbounded Power of the Prerogative in Diſtreſſes, and the great Abuſe and Oppreſſion exerciſed by the King's Bailiffs and by Lords of Liberties. * Vide 51 H. 3. Stat. 4. A. D. 1266.

The King by his Prerogative at the Common Law, might take the Land, as well as the Goods and Chattels in Execution; (Sir *Wm. Harbert*'s Caſe. 3 *Co.* 12:) Conſequently the Beaſts of the Plough.

And though *Sheep* are expreſsly mentioned in that Act, yet *Sheep may* be diſtrained for Toll. Which proves "that "this Act does *not* extend to *all* Diſtreſſes." *Cro. Eliz.* 710. is ſo: *Smith* v. *Shepheard*—Where Sheep were taken for a Toll of 2 *d.* for every 20 *Sheep*; And no Sort of Objection, "that Sheep were not diſtrainable."

Beſides the Act of 43 *Eliz. c.* 2. is an *implied Repeal* of the Stat. de diſtrictione Scaccarij.

Another Anſwer to this Act is—That if they would have availed themſelves of it, a *Special* Action ought to have been brought *upon* this particular Statute. *Regiſter* 97. *b.* & *F. N. B.* 89. & 90. are particular Forms of Writs upon it.

* So, upon the Stat. of *Marlbridge*, *c.* 4. (which prohibits unreaſonable Diſtreſſes,) *Treſpaſs* will not lie for an unreaſonable Diſtreſs: But the Remedy muſt be by a *Special* Action founded on the Statute. In 2 *Strange* 851. *Lynne* v. *Moody*, It was adjudged "that *Treſpaſs* will *not* "lie for taking an exceſſive Diſtreſs: But the Remedy "ought to be by *Special* Action founded on the Statute of "*Marlbridge*." And on the ſame Statute, "that Diſtreſſes taken in one County, ſhall not be driven into another," there are Writs formed. *Regiſter* 97. *F. N. B.* 82. But *Treſpaſs* will not lie: It muſt be a *Special* Action. 3 *Lev.* 48. *Woodcroft* v. *Thompſon*—The three Judges held, (againſt *North*,) "that he that would take Advantage of "the Statute of *Marlbridge*, *c.* 4, and 1, 2 *P.* & *M. c.* 12. ought to do it by way of Action, &*c.*" * P. 584.

Their Argument would prove too much. For *Sheep* were privileged by the Common Law; and by the Stat. de Diſtrictione Scaccarij, expreſsly "No Man ſhall be diſtrained "by &*c*—*nor by his Sheep*." But *Sheep* are *now* allowed to be diſtrainable for a *Poor's Rate*. So are the *other* Things mentioned

mentioned by Lord *Coke* (from the Mirrour) in his 2d *Inſt.* 133. * as not diſtrainable at Common Law, if there were other Goods ſufficient. All theſe are ſurely diſtrainable for this Rate. 1 *Ld. Raym.* 386. *Raym.* 232. & 2 *Lev.* 96. S. C. *Cro. Eliz.* 710.

* V. Comment on c. 15. ſub finem which mentions Beaſts and living Things; and alſo mort-Goods, as Armour, Apparel, Veſſel, Jewels &c, and even Saddle Horſes.

Therefore the 43 of *Eliz.* is *not confined* to COMMON LAW Diſtreſſes.

But theſe Beaſts are ſtated to be "Beaſts of the Plough "AND *Cart*." Therefore they *are* diſtrainable: For Beaſts of the *Cart* are not privileged. 1 *Sid.* 422. 440. *Welſh* v. *Bell.* 2 *Keb* 595. S. C. *Bract. Lib.* 4. 217. *b.* ſpeaks of *Oxen*, as Beaſts of the Plough.

However, *This* is an EXECUTION: And therefore none of the Arguments relative to the Diſtreſſes can be applied to *this* Caſe.

When Goods are ſeiſed in *Execution* on a *fieri facias*, the Debt is diſcharged. So is 2 *Ld. Raym.* 1072. *Clerk* v. *Withers.*

This is a Diſtreſs for a *Satisfaction* of the Demand: *not* for a Pain or Penalty or Pledge. Conſequently, it is an *Execution*. This is the *Eſſential Difference* between an Execution and a Diſtreſs at Common Law.

In the Caſe of *Rex* v. *Speed*—*Caſes temp. W.* 3. 328. A *Levari facias* out of *B. R.* after Affirmance of a Conviction * P. 585. * for Deer-Stealing was holden regular: And it was conſidered as an *Execution*; For *per Holt*, "When a Statute "ſays *Money ſhall be levied by Diſtreſs*, this is an *Execu*"*tion*." Therefore, it being an *Execution*, Beaſts of the Plough might have been taken.

And ſo they may here, *This* being an EXECUTION.

What has been urged on the other Side, from 2 *Inſt.* 133. "That the Statute de Diſtrictione Scaccarij extends to *all* "Diſtreſſes whatſoever, and likewiſe to Executions," is one of the very few Miſtakes of that excellent Writer. And this Opinion of Lord *Coke* is not only contrary to common Experience; but alſo to the Opinion of Ld. Ch. J. *Holt*, in *Comber.* 356. *Hardiſty* v. *Barney*—where *Holt* ſaid, "that "upon a *Fieri facias* the Sheriff may take *any Thing* but "wearing Clothes; Nay, if the Party has two Gowns, He "may take One of them."

And *Sheep* are notoriouſly diſtrainable now: and yet they are expreſsly and by Name, within the Stat. de Diſtrictione Scaccarij.

The

The Stat. of *Weſtm.* 2. *c.* 18. which gives the Elegit, expreſsly excepts Beaſts of the Plough. At that Time the Legiſlature throught ſuch Exception neceſſary. And *Dyer* 7. *b. pl.* 10. ſays That a Man ſhall not have Execution of the Profits of a Filazer's Office; becauſe he cannot grant and aſſign it. So that the Rule ſeems, from that Caſe, to be, "that whatever may be aſſigned by the Party, may be "taken in Execution, *et è contra.*"

The Doctrine on which theſe Gentlemen build their Arguments, is now *obſoiete*, and unknown to the Generality of Mankind: And it would be very inconvenient to reeſtabliſh it. And this Diſtreſs is for the Benefit of the Debtor, as theſe Things are moſt ſaleable; and of no Prejudice to any Body. And no Caſe is cited on the Part of the Plaintiff.

In 3 *Salk.* 136. it is ſaid to have been adjudged "that "the Rule of Common Law, to exempt &c, extends to "Caſes where a Diſtreſs is given in the Nature of an Ex- "ecution, by any particular Statute, as for Poor Rates "&c." But perhaps this is no Authority to be relied on.

As to the next Queſtion. I agree to 2 *Lutw.* 1532. "That a ſecond Diſtreſs cannot be taken for the Remain- "der of the ſame Rent, where the firſt Diſtreſs was only "for *Parcel* of the whole Rent due." But in this preſent Caſe, if the Officer is *deceived in the Value* of the firſt Diſtreſs, he *may* take a Second: So, if the firſt *dies in the Pound*, (*Dyer* 280. *b. pl.* 14.) or is by Accident *become* * *ineffectual*; Or if the Officer did *not know* that there were ſuch other Goods; (which laſt might be the preſent Caſe.) Theſe cannot be looked upon as two diſtinct Diſtreſſes for one entire Demand.

* P. 586. 3d Original Queſtion; (Mr. Williams's 2d.)

But if this be conſidered AS *an* EXECUTION; Then there can be no doubt about it. For the Sheriff may, in *ſuch* Caſe, re-enter before the Return of his Writ, to complete his Execution. And this laſt Reaſon equally anſwers the Objection to the *Warrant:* For that is *not completed* and *finiſhed*, TILL the *Whole* Demand is levied.

6th Queſtion. As to the *Exceſſiveneſs* of the 2d. Diſtreſs— 6th Original Queſtion; (Mr. Williams's 3d.)

He did not much contend that it was not ſo, But He inſiſted that an Action of *Treſpaſs will not* lie for taking an exceſſive Diſtreſs. For Proof of which, He relied on the Caſe of *Lynne* v. *Moody*. 2 *Strange* 851. and the Caſe in 3 *Lev.* 48. *Woodcroft* v. *Thompſon*.

The

The Declaration contains two Courts; One for each Treſpaſs: And the Damages are given jointly for Both. Therefore it is incumbent, upon the Plaintiff, to ſhew that *both* theſe Diſtreſſes are illegal.

Reply. Mr. *Stowe* in Reply—

4th Queſtion. The Caſes of *Tolls* are not applicable to the preſent Caſe.

Agriculture deſerves Encouragement *now*, as well as formerly.

I ſuppoſe the King's Diſtreſs might be ſold at *Common Law*. Therefore the Act *de Diſtrictione Scaccarij* does extend to *Executions*. And the 43 of *Eliz.* has not repealed it.

Theſe Beaſts are privileged, if there be ſufficient beſides: And here was ſufficient beſides. Beaſts of Cart are within the ſame Reaſon, as Beaſts of Plough: The *gaignont ſon Terre*, as the Statute of 51 *H.* 3. ſays.

3d Queſtion. The Arguments of *Obſoleteneſs* and *Ignorance* will not hold: For the *former* is not true; and the *latter* will not excuſe. 'Tis no part of the Caſe, "That they did *not at firſt* "*know* the Value." And it is begging the Queſtion to ſay "That he may take a ſecond Diſtreſs, when the firſt was "not ſufficient." That is the very Thing that wants to be proved.

6th Queſtion. As to the Caſe of *Lynne* v. *Moody*—The Entry there was at firſt *lawful*; and there was Nothing *ſubſequent* to make * P. 587. * that lawful Entry a Treſpaſs. But here, the ſecond Entry to take the ſecond Diſtreſs, was *tortious*: And therefore they are liable to an Action. So that that Determination does not affect the preſent Caſe.

CUR' ADVIS.

This Cauſe now ſtanding in the Paper, for the Reſolution of the Court,

LORD MANSFIELD delivered their Opinion.

The Rule of *Niſi Prius* is ſo conceived as to ſubmit the Caſe to the Opinion of the Court, but that whatever it may; and ſo as to obviate all Objections to the Form of the Pleadings and Finding of the Verdict.

In ſtating the Caſe, He obſerved that there *were other* Things which might have been taken upon the *firſt Diſtreſs*, beſides

beſides thoſe which were actually diſtrained: But *not* upon the *Second*, (from any Thing that appears.)

Upon the firſt Argument, the two firſt Objections were laid out of the Queſtion: Eſpecially ſince the 17 *G.* 2. *c.* 38. So that the *Juſtices* were out of the Caſe. For a Defect in the Rate (*unappealed from*) could not avoid the Warrant; Nor is the Warrant *void*, ſo as to make it a Treſpaſs *ab initio*: And the *Juſtices* could not be Treſpaſſers, by what the Officers afterwards did.

So that it was reduced to 3 Queſtions: *viz.*

1ſt. Whether (upon the firſt Diſtreſs) AVERIA CARUCÆ could be taken and diſtrained for a *Poors Rate and Aſſeſſment*; when there were *other Things* that might have been diſtrained, and which were *more than ſufficient* to anſwer the Value of the Demand.

The 2d Queſtion turned upon two Objections to the ſecond Diſtreſs: *Viz.* 1ſt. Whether the *ſecond Diſtreſs*, under the *ſame* Warrant was at all juſtifiable, when there was enough that might have been taken upon the *firſt*; and 2dly. Whether this ſecond Diſtreſs, being *exceſſive*, *that* Circumſtance alone was not a ſufficient Ground to maintain THIS *Action of* TRESPASS, independent of any other Conſideration.

On the ſecond Argument, Mr. *Williams* not only argued very well as Counſel for his Client, but he explained the whole Learning of *Diſtreſſes at Common Law*; which were a *Nomine Pœnæ*, not a Satisfaction: And as I adopt the * Reaſoning of his Argument throughout, to avoid Repetition now, I will in a great Meaſure refer to it for the Grounds of the Opinion which the Court is of. * P. 588.

The 1ſt Queſtion is "Whether *Averia Carucæ* may be "taken for a *Diſtreſs upon the Poors Rate*, where there are "*other* diſtrainable Goods ſufficient."

As to this—The *ſolid Diſtinction* is, "That the Seiſing under the 43 of *Eliz.* and ſuch like Acts of Parliament, is *but* PARTLY analogous to the *Common Law* DISTRESS, (as being repleviſable *&c*;) but is *much more* analogous to the Common Law EXECUTION; (like a *Fieri facias*, where the Surplus, after Sale, ſhall be returned.)

In the Old Common Law Diſtreſſes, which were in nature of a *Nomine Pœnæ* to compel Payment, It would have been abſurd to have ſuffered the Implements by which a Man gained his Livelihood to be holden as a Pledge: Becauſe that would have been taking from the Man, the only

only Means he had, of being able to pay the Debt. But this Reaſon don't hold, where the Things diſtrained may immediately be ſold by way of Satisfaction: Which, though called a Diſtreſs, yet really is, in this Reſpect, an *Execution.*

The Adjudication ſaid to have been made in *M.* 8. *W.* 3. *C. B.* in 3 *Salk.* 136. was very properly cited by Mr. *Williams*, as no ſufficient Authority, and not (of itſelf) to be relied upon: But I take it that the ſame Reaſon was gone upon, in the Caſe in 1 *Ld. Raym.* 386. *Vinkenſterne* v. *Ebden*, *M.* 10 *W.* 3. *B. R.* Where Ld. Ch. J. *Holt* ſays, "It is "true, a Horſe cannot be diſtrained in a Smith's Shop "*&c: But* there is *no ſuch* Reſtriction, where the Diſtreſs is "for a PERSONAL *Duty.*" And He obſerved that the Duty, in that Caſe aroſe out of the Goods laden to be exported: So that by their being laden, the Duty commenced, and the Ship became chargeable; and, *à fortiori*, any Part of her. I take the Meaning of what He there ſays of *perſonal* Duties, to be applicable to the Caſe of *Parliamentary Duties* alluded to in 3 *Salkeld*, and conſequently to be agreeable to 3 *Salk.* 136. which ſays, It was adjudged "That this Common Law Exemption of Utenſils, Tools, "Inſtruments of Huſbandry *&c*, from Diſtreſs, holds only "in Diſtreſſes for *Rent*-Arrear, *Amerciaments &c*; but "doth NOT *extend* to Caſes where a Diſtreſs is given in the "*nature of an Execution*, by any particular *Statute*; (as "for Poor Rates *&c.*")

Therefore it is more analogous to an *Execution*, than to a Diſtreſs at Common Law: And *there*, (in Caſes of Execution,) *Averia Carucæ may* be diſtrained; although there be other ſufficient Diſtreſs.

* P. 589. * And on *this* Ground, We are All of Opinion that there is no Objection to the *firſt* Diſtreſs, from the *Averia Carucæ* being taken: For that they *are diſtrainable* under the 43 *Eliz.* and *ſuch like Acts of Parliament.*

Thus far, You ſee, relates only to the *firſt* Diſtreſs.

As to the SECOND Diſtreſs—

The 1ſt Queſtion relating to *that* is, "Whether this *ſecond* "Diſtreſs can be AT ALL juſtified; As it was a SECOND "Diſtreſs taken under the *ſame* Warrant; when enough "*might* have been taken *at firſt*, if the Diſtrainer had then "thought proper."

Now a Man who has an ENTIRE Duty, ſhall *not* SPLIT the *entire* Sum; and diſtrain for *Part of it* at one Time, and for *other Part* of it at another Time; and ſo *toties quoties*, for ſeveral Times: For *that* is great Oppreſſion, And that is the Caſe of *Willis* v. *Savill et al'* in 2 *Lutw.*

1532:

1532: Where the ſecond Diſtreſs was holden unjuſtifiable; becauſe Both Diſtreſſes were taken for *One and the ſame* Rent; And it was the Leſſor's Folly, that He had not taken a ſufficient Diſtreſs at firſt.

But if a Man ſeiſes *for the* WHOLE Sum that is due to him, and *only* miſtakes the *Value* of the Goods ſeiſed, (which may be of very uncertain, or even imaginary Value, as Pictures, Jewels, Race-Horſes *&c.*) there is no Reaſon why he ſhould not afterwards *complete* his Execution by making a further Seiſure. And how can the Officer who ſeiſes, judge of the real or perhaps imaginary Value of the Horſes or Goods ſeiſed? The Value of them may be quite unknown to him, or may even depend upon Whim and Fancy.

It is to the *Advantage* of the Owner of the Goods, that this ſhould be ſo: It is better for him that the Officer ſhould be at Liberty to ſeize a ſecond Time, in caſe he makes an inſufficient Seiſure the firſt Time. Or elſe, it might induce him to a Neceſſity of taking Effects of a very great Value, at firſt: For if he is to be precluded from thus making up the Deficiency, He will certainly take care not to take too little at firſt.

Now Pictures, Horſes, Jewels, Books, and ſome other ſuch Effects, may be of ſo uncertain and even imaginary or fancied Value, that it may be exceedingly uncertain how much Money they may fetch, when they came to be ſold: So that the Perſon ſeiſing may not be at all able to judge how much they may produce, upon Sale.

* And if he does not take the Value of the whole at firſt, (out of Tenderneſs and Moderation perhaps,) there is no Reaſon why he ſhould not complete it by a ſecond Seiſure; Provided it be for the SAME *Sum due.* * P. 590.

Therefore this *firſt* Objection to the Second Diſtreſs, fails.

3d. Queſtion. The *ſecond* Objection to this ſecond Diſtreſs, is the third remaining Queſtion; *viz.* Its being *exceſſive*, and as ſuch being a ſufficiant Ground for an Action of Treſpaſs.

Now as to this third Queſtion, "Whether the taking an "exceſſive Diſtreſs, ia a ſufficient Ground to maintain an "Action of Treſpaſs;" ſeveral Authorities have been cited, * to ſhew "that an Action of *Treſpaſs* will NOT *lie* for "taking an exceſſive Diſtreſs;" but "that it ought to be a "*particular* Action grounded upon the Statute;" And particularly, One Caſe. which is in 2 *Strange* 851. *Lynne* v. *Moody*, *M.* 3 *G.* 2. *B. R.* where it had been adjudged for the Plaintiff, in *C. B.* But the Judgment of *C. B.* was reverſed; * Vide ante pa. 582, 583, 584, 585, 586.

verſed; And, it was ſaid "That the Remedy ought to "be by *Special* Action *founded on the Statute* of *Marlbridge*."

So that it has been ſufficiently eſtabliſhed "That a *Ge*"*neral* Action of *Treſpaſs* can *not* be maintained for tak"ing an exceſſive Diſtreſs."

One Caſe indeed was cited to the *contrary*: Which was the Caſe of *Moir* v. *Munday*, *H.* 28 *G.* 2. *B. R.* And that was an Action of *Treſpaſs*; where 6 Ounces of *Gold*, and 100 Ounces of *Silver*, were taken for 6*s.* 8*d.* which was holden to be an exceſſive Diſtreſs; And Judgment was given for the Plaintiff.

But that *appeared* upon the *Face* of it, and upon the *Pleadings*, to be exceſſive: And ſo the Court expreſsly declared. And it was a Diſtreſs of *Gold* and *Silver*; which are of a *certain known* Value; and even the *Meaſure of the Value* of other Things. But it was there holden, "that in "*all* OTHER Caſes of Goods or other Things of *Arbitrary* "and uncertain Value, it MUST be an Action *upon* the *Sta*"*tute*." And this (as I am told) was the Diſtinction there taken: And that is therefore an *Exception* (and was there conſidered as being ſo) from the general Rule; and ſerves to *confirm* the Rule itſelf.

We are therefore All of Us of Opinion That there is *no* Cauſe of Action maintainable by the Plaintiff in the preſent * P. 591. * Caſe, nor has he any Right to recover againſt ANY of the Defendants; and that the Defendants be at Liberty to enter a Non-ſuit.

The RULE taken was,
"That the *Poſtea* be delivered to, and
"Judgment entered for the DEFENDANTS."

Monday 8th May 1758.

Rex *verſ.* Inhabitants of Caverſwall.

See this CASE *abridged* in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, No. 147. pa. 461.

Baldwin et Ux' *verſ.* Blackmore Eſquire.

Tueſday, 2d May 1758.

THIS was a Caſe reſerved at the Aſſizes for the County of *Lancaſter* in an Action for an Aſſault upon, and *falſe Impriſonment* of the Plaintiff's *Wife.*

CASE—That the Plaintiffs *William Baldwin* and *Suſannah* his Wife, being *Paupers*, legally ſettled in the Townſhip of *Banknewton* in *Yorkſhire*, had been regularly and properly *removed by an Order* of two Juſtices of the County of *Lancaſter* from *Marſden* in *Lancaſhire*, to the ſaid Townſhip of *Banknewton* in the ſaid County of *York*, as the Place of their laſt legal Settlement: Which Order was not appealed from. That afterwards, they (*Both* of them RETURNED of their *own accord and without* bringing any Certificate with them from *Banknewton* (to which they belonged,) to *Marſden* aforeſaid, from whence they had been ſo removed by the ſaid Order of two Juſtices. Of which, Complaint being made in Writing, and upon Oath, to the Defendant, who was a Juſtice of Peace of the ſaid County of *Lancaſter* wherein the ſaid Pariſh of *Marſden* lay, by the Overſeer of the ſaid Pariſh (from which the Paupers had been lawfully removed, and to which they unlawfully returned,) He iſſued his Warrant to bring the two Paupers (the Man and * his Wife) before him; Who being accordingly brought * P. 596. before him, and the Facts being fully proved, upon Oath, made by *Thomas Murgatroyd*, one of the Churchwardens of *Marſden* aforeſaid, He committed BOTH of them, the Man AND *his* WIFE, to the *Houſe of Correction*, "there to remain "UNTIL they ſhould be DISCHARGED BY DUE COURSE OF "LAW." The Warrant was directed to the Conſtable of *Marſden*, to convey; and to the Maſter of the Houſe of Correction in *Preſton*, to receive: And was in theſe Words, "Whereas *Thomas Murgatroyd*, One of the Church-war-"dens of the Townſhip of *Marſden* in the ſaid County, hath "made Oath before Me, One of his Majeſty's Juſtices of "the Peace in and for the ſaid County, That *William Bald-"win* and *Suſan his Wife*, poor Perſons, having been lately "removed by an Order under the Hands and Seals of *Ro-"ger Heſketh* and *Rigby Molineux* Eſquires, Two of his "Majeſty's Juſtices of the Peace and *Quorum* in and for "the ſaid County, from the ſaid Townſhip of *Marſden* "unto *Banknewton* in the Weſt Riding of the County of "*York*, as to their laſt lawful Settlement, are now return-"ed back, to inhabit in the ſaid Townſhip of *Marſden*, "*contrary to* THE *Statute* in this Behalf made; Theſe are "therefore, in his Majeſty's Name, to command you "forthwith to convey THEM the ſaid *William Baldwin* "and *Suſan his Wife*, to the *Houſe of Correction* aboveſaid.

" and deliver THEM to the Maſter thereof; hereby requir-
" ing Him to receive THEM into his Cuſtody, and THEM
" ſafely to keep UNTIL they ſhall thence be diſcharged by
" *due Courſe of Law.* Hereof, fail not, at your Peril——
" Given *&c*, this 8th Day of *February*, *&c.*"

That under this Warrant of Commitment, the Plaintiff and his Wife were kept in Priſon in Cuſtody of the Keeper of the Houſe of Correction at *Preſton*, from 12th *February* to 17th *March* following.

Notice was proved to be given to the Defendant of bringing the Action, one Month before it was brought.

Upon the Trial of this Cauſe, there was a Verdict for the Plaintiff, and 1 *s.* Damages, ſubject to the Opinion of the Court upon the two following Queſtions; *viz.*

1ſt. Whether there ought not to have been a *previous Conviction* of *Vagrancy*.

2dly. Whether the WIFE could be convicted of *Vagrancy*, or be liable to be ſent to the Houſe of *Correction* for returning without a Certificate; as She only accompanied and reſided with her *own Huſband*.

* P. 597. * *N. B.* By 13, 14 *C.* 2. *c.* 12. §. 3. It is provided that any Perſon or Perſons *may go* TO WORK in any Pariſh or Place, *carrying* with them a *Certificate* of their being Inhabitants of their proper Pariſh: And, in ſuch Caſe, if they ſhall not return when their Work is finiſhed; or ſhall fall ſick or impotent, whilſt they are in the ſaid Work; it ſhall not be accounted a Settlement; but two Juſtices of the Peace may convey *the ſaid* Perſon or Perſons to the Place of his or their Habitation as aforeſaid. And if *ſuch* Perſon or Perſons ſhall refuſe to go, or ſhall not remain in ſuch Pariſh, but *ſhall* RETURN, *of* HIS *own Accord*, to the Pariſh from whence He was removed; it ſhall and may be lawful for any Juſtice of the Peace of the City County or Town-Corporate where the ſaid Offence ſhall be committed, to *ſend* SUCH *Perſon or Perſons* offending, to the *Houſe of Correction*, there to be *puniſhed as a* VAGABOND; or, to a *public Workhouſe* (in the Act after-mentioned;) there to be employed in Work or Labour.

By 17 *G.* 2. *c.* 5. §. 1. It is enacted, that Whereas the Number of Rogues Vagabonds Beggars and other idle and diſorderly Perſons daily increaſes *&c*; All Perſons who threaten to run away *and* LEAVE *their* WIVES

WIVES *or Children* to the Pariſh; and ALL *Perſons who ſhall* UNLAWFULLY *return* to ſuch Pariſh or Place from whence they have been legally removed by Order of two Juſtices of the Peace, WITHOUT *bringing a Certificate* from the Pariſh or Place whereunto they belong; And alſo all Perſons who *&c*, *&c*; *ſhall be deemed* IDLE AND DISORDERLY *Perſons:* And *it ſhall and may be lawful* for any *Juſtice of Peace* TO COMMIT *ſuch Offenders* (*being thereof* CONVICTED before Him, by his own View, or by their own Confeſſion, or by the Oath of One or more Credible Witneſs or Witneſſes,) to the *Houſe of Correction*; there to be kept to hard Labour, for any Time NOT *exceeding one Month.*

As to the two Points, It was inſiſted on Behalf of the Plaintiff——

1ſt. That there ought to have been a *previous* CONVICTION of Vagrancy, before the Juſtice could commit to the Houſe of Correction at all.

2dly. That *Suſannah* the Wife, following and *reſiding* WITH *her* OWN HUSBAND to and at *Marſden*, could not be convicted of VAGRANCY, for returning there without a Certificate.

This Cauſe was firſt argued on *Tueſday* the 21ſt of *June* 1757, by Mr. *Yates* for the Plaintiff, and Mr. *Clayton* for the Defendant; And again on *Friday* the 11th of *November* following, by Serjeant *Poole* for the Plaintiff, and Mr. *Norton* for the Defendant. * P. 598.

For the Plaintiff it was argued to the following Effect. For the Plaintiff.

1ſt Point—On 17 *G.* 2. a *previous Conviction* is expreſsly made neceſſary; The Words of it are, "being thereof "*convicted &c.*" And 3 Methods of Conviction are ſpecified; *viz.* View, Confeſſion, and Proof by One or more Witneſſes.

Now here was nothing but the mere Complaint and Information of the Pariſh-Officer; without any *Adjudication* by the Juſtice, "that it was true."

Therefore the Juſtice proceeded without any Authority.

On 13, 14 *C.* 2. No previous Conviction is indeed neceſſary, by any expreſs Words of the Act of Parliament. But ſuch an arbitrary and extraordinary Power ought to be very narrowly watched. However, this cannot be a Proceeding under the Statute of 13, 14 *C.* 2. For the Foundation of this Warrant is the Information of the Church-Warden on Oath; which plainly goes upon an Offence

created ſince that Statute of *C.* 2. *viz.* "Returning *with-* "*out bringing a Certificate* from the Pariſh to which they "belonged."

2d Point—This Return of the Woman cannot be conſidered as an *unlawful* Return. A Feme Covert is *obliged* to follow her Huſband. If She commits Theft, in Company with her Huſband, it ſhall be taken to be done by the Coercion of her Huſband. 1 *Hawk. P. C. fo.* 2, 3. *Sect.* 9, 10, 13. *Bro. Coran.* 108. *Kelynge* 31, 37. *Hale's H. P.C. Vol.* 1. *pa.* 47. and *pa.* 516. 3 *Inſt.* 108.

Indeed there are Caſes where the Wife is the PRINCIPAL *Actreſs*, (as keeping Bawdy houſes,) where She is puniſhable with her Huſband. But here, SHE is guilty of *no* Offence at all.

As to its being a hard Action—Our's is a very hard Caſe.

For the Defendant.

Contrà for the Defendant, (the Juſtice of Peace, who had committed the Woman,) it was argued to this Effect;

1ſt Point—If this Proceeding ſhould be taken to be on 17 *G.* 2 And even ſuppoſing a Conviction to be previouſly neceſſary, Yet it is not neceſſary that ſuch a Conviction ſhould be *expreſsly* STATED upon this Caſe: But the Juſtice may, *at any Time*, draw up a Conviction in Form, upon the Facts here ſtated; which Conviction he was not obliged to draw up *in Form*, till called upon.

* P. 599.

* But this Proceeding is upon 13, 14 *C.* 2. *c.* 12 § 3. And the Caſe is within the Words of that Act, *viz.* "Re- "turning of her own Accord, to the Pariſh from whence "ſhe was removed."

And theſe two Acts (of 13, 14 *C.* 2. and 17 *G.* 2.) are conſiſtent: And the latter does *not repeal or vacate* the former; It operates as a *Saving*, under that Act. And upon this former Act, no Conviction is neceſſary.

2d Point—A Wife may be guilty and liable in committing a Crime *with* her Huſband, from Treſpaſs * up to Murther and Treaſon. In Dr. *Huſſey*'s Caſe, in *Hob.* and in Lord *Coke*, A General Rule is laid down, as to married Women, "That where they offend voluntarily and know- "ingly, they are liable to Puniſhment."

* V. Hob. 96. and 9 Co. 73. Dr Huſſey's Caſe: Where whatever may be to the Purpoſe in the preſent Caſe (if any Part of it is at all ſo,) will be found.

This is a new Law; and the Wife was intended to be included in it: And if Wives are within the Miſchief of a Statute, they ſhall be included in it. The matrimonial Vow muſt be underſtood as reſtrained to *lawful* Acts: The Wife ought not to obey her Huſband in unlawful Acts.

In

In Treſpaſs *vi et armis*, the Wife might be ſeiſed for the Fine. The Coercion of the Huſband *only excuſes* Her from ſuffering for the Crime: It does not make the Act *lawful*. She ought not to commit Theft; although the ſuppoſed Coercion of the Huſband excuſes Her from Puniſhment.

This Act expreſsly includes *All* Perſons whatſoever. The Words are general; and ſo alſo was the Intention.

And the Huſband's Act (of returning) is *unlawful:* And therefore She ought not to follow him, and thereby commit an unlawful Act herſelf. Nor is She obliged to follow Him *for Maintenance:* For the Pariſh, to which they were removed, is obliged to maintain Her, in the ſame Manner as if her Huſband had run away.

If it were otherwiſe, here would be an innocent Pariſh, who muſt be at a continual Expence of removing the Wife back, *toties quoties*, without being reimburſed for their Charges: And if She was *obliged* to return with her Huſband once, She would *always* be obliged equally ſo to do, whenever He ſhould return Himſelf.

All their Reaſonings would hold juſt as ſtrongly in obliging the Wife *to aſſiſt* her Huſband and *obey him* in *keeping a* * *Bawdy-houſe*, as in *any other* ILLEGAL Act. Yet for keeping a Bawdy-houſe, ſhe is certainly puniſhable with her Huſband. * * P. 600.

* 1 Salk. 384. Regina v. Williams, M. 10 Ann. B. R. and Rex v. Hayward, a later Caſe.

This is not a Commitment in *Execution*, and by Way of *Judgment* for an Offence: It is a Commitment on 13, 14 *C.* 2. and not on 17 *G.* 2. nor for any definite Time. They might have been *bailed* on this Commitment: For it is only, "*till* "diſcharged by due Courſe of Law." And though the Words of the Act of 13, 14 *C.* 1. are "*There to be puniſhed as a Vagabond*; yet this is only in order to be amenable to Juſtice upon a *future* Indictment. And ſo the ſending them "to a *public* † *Workhouſe*, there to be employed in "Work and Labour," is no Puniſhment to a poor Perſon, who is *uſed* to Work and Labour.

† But this Commitment is "to the Houſe of Correction."

It would be highly UNreaſonable that the Huſband (who could not bring an Action in his *own* Name and on his *own* Account) ſhould be permitted to bring it on Account of his *Wife*, and in her Name, againſt a Magiſtrate who has acted for the public Good; and HIMSELF *receive the Benefit* of what has been originally occaſioned by and taken its Riſe from his OWN UN*lawful Act*.

The Counſel for the Plaintiff replied to the following Effect.

As

Reply. As to the Conviction being ſtill in the *Power of the Juſtice* to draw up in Form—It does not appear that there *ever will* or *can* be ſuch a Conviction: But it is plain that there IS *none*.

It does not any how explicitly *appear upon* WHAT *Act*, this Commitment is founded. But however, it *muſt* be on 17 *G.* 2. becauſe the Information is for an Offence expreſsly within that Statute; and the Warrant of Commitment is founded upon the Information. Therefore there ought to have been a *previous Conviction*.

The Certificate could not be in the *Wife*'s Power to produce: Her Huſband muſt have it, if there was any.

We do not deny that the Wife was ſo far *within the Intent* of this Act of Parliament, that She was *capable* of being a Vagrant: She might have gone about begging; She might have returned to this Pariſh without her Huſband. But We ſay that here is no Act of Vagrancy ſtated; and for the particular Fact that *is* ſtated, her being *ſub Poteſtate Viri*, was an *Excuſe* to Her: She is within all the Excuſes mentioned in Dr. *Huſſey*'s Caſe, for Perſons guilty againſt the *Letter* of a Law.

The Hardſhip of the Pariſh to which theſe Perſons returned cannot deſtroy the General Law of the Land.

* P. 601. * A married Woman's Keeping a *Bawdy-houſe* jointly with her Huſband, varies from the general Principle: Becauſe there She is the PRINCIPAL *Actor*, and *Chief Manager* and *Conductor*.

The preſent Commitment is, "*till* diſcharged *by due* "*Courſe of Law*." But ſtill it may be a Commitment on 17 *G.* 2: As it does NOT EXCEED a Month; though it does *not indeed fix* it TO a Month.

It is a quite new Doctrine, "that Impriſonment in a "Houſe of Correction is no Puniſhment:" Certainly, It is a Puniſhment, and no ſmall One.

As to the Huſband's becoming intitled to the Damages, when recovered; that ariſes from the *Law* itſelf: But it is properly the *Wife*'s Action, and will *ſurvive to* HER; though She (being Covert) cannot by Law bring it in her *own Name*. This therefore is the *Act of the Law*; and ought not to be objected to the *Huſband*, much leſs, to the *Wife*, whoſe Action this properly is.

Lord

Lord MANSFIELD deſired to be informed how the Uſage was: (though it would not indeed, as he obſerved, alter the *Law.)*

The Counſel had not made this Inquiry. But Both the Counſel, and alſo Mr. Juſt. FOSTER and Mr. Juſt. WILMOT ſaid, That the Act of 13, 14 *C.* 2. had been ALWAYS *conſidered* as GENERAL, and NOT *as tied up* by the particular Words of Reference to that *particular* Caſe of *going to work, only*. And

Lord MANSFIELD ſaid that perhaps that might have been practiſed for the Sake of General Good.

He ſtrongly intimated that it would be a right Thing to *compromiſe* this Cauſe: And if it ſhould not be ſo, He deſired to know the *Practice and Uſage*, about ſending the *Wife* to the Houſe of Correction, with the Huſband.

As to 13, 14 *C.* 2. He ſaid He was now ſatisfied by his Brother *Foſter*, "That it had always been *taken* as a "GENERAL Law;" notwithſtanding the Words of Reference; (which Had ſtruck him on the Reading.)

Mr. Juſt. FOSTER deſired to know alſo how the Practice had been as to *Children*.

Mr. *Clayton* (who was Counſel for the Defendant in the former Argument) ſaid He had known the *Children* alſo committed.

CUR' ADVIS', (i. e. *eventually* if not compromiſed.)

* P. 602.

On *Tueſday*, 25th *April* 1758, This Caſe being mentioned at the Bar, as ſtanding for the Opinion of the Court,

Mr. *Norton* (for the Defendant) then ſaid He had ſeveral Certificates of its being the PRACTICE, for Juſtices to commit the WIFE, as well as the Huſband, for Returning to the Pariſh from whence they had been removed; *although* She ſo returned, WITH *her Huſband*.

Lord MANSFIELD now (on *Tueſday* 2d *May* 1758,) delivered the Reſolution of the Court.

He firſt ſtated the whole Caſe very fully. And he prefaced, That it was manifeſt that the Juſtice had *not* acted *intentionally* wrong: And it is plain that the Jury were of that Opinion, as appears by their giving *only* 1 *s.* Damages:

mages: The Court would gladly therefore have leaned towards excuſing this Gentleman from ſuffering for what he had honeſtly and without any bad Intention done; if they could have found him juſtifiable by any legal Excuſe.

But there is One FATAL *Objection* to his Proceeding, which We cannot get over; and which puts all the *other Points*, out of the Caſe: And that is, that the WARRANT of Commitment IS ILLEGAL.

The *Legality of the Warrant* depends upon *Two* Acts of Parliament, or at leaſt upon *One* of them: For there are Two Acts of Parliament upon *One* of which two, this Warrant muſt be founded; though it does not appear, upon *which* of the Two, the Juſtice proceeded.

* Vide ante p. 597.
† 8, 9 W. 3. c. 30. firſt introduced them.

Theſe two * Acts are 13, 14 *C.* 2. *c.* 12. (a Law made *before* Certificates under the † late Acts exiſted, and 17 *G.* 2. *c.* 5. (which relates to Perſons returning, *&c.* without bringing ſuch a Certificate.)

Now this Warrant is *not* within this *former* Act, of 13, 14 *C.* 2: Nor is the Caſe itſelf within it. Theſe Perſons did not go to any Pariſh, *carrying with them* a Certificate of their being Inhabitants of their proper Pariſh: Nor is the Commitment made "to the Houſe of Correction *there to be puniſhed as a Vagabond*;" Nor "to a *public Workhouſe*, "*there to be employed in Work and Labour*;" as that Statute directs. So that the Warrant is not at all agreeable to the *Directions* of THAT Act, which ſpecifies the *particular Manner* of ſending the Offender to the Houſe of Correction, or to a public Work-houſe: For it is, only, "to remain "TILL *diſcharged by due Courſe of Law*."

* P. 603.

Neither can this Warrant be good upon the *latter* Act, of 17 *G.* 2. *c.* 5. Becauſe though this is indeed a Commitment to the Houſe of Correction, (which the latter Act directs,) Yet it is "*to* REMAIN there TILL *diſcharged by due Courſe* "*of Law*." Whereas, by *this Act*, the Power given the Juſtice is "To commit ſuch Offenders to the Houſe of Cor-"rection, there to be kept to hard Labour for any Time "NOT *exceeding* ONE *Month*." But this *Warrant* is quite *general:* It is *an* IN*definite* Commitment; NOT for a *preciſe limited Time*, as this Act expreſsly directs and requires.

Therefore the Warrant of Commitment is totally illegal: And conſequently, the Plaintiff is intitled to the Damages that he has recovered.

And

And You'll obſerve, that WE *go* ONLY *upon the* WARRANT: Which, for the Reaſons I have mentioned, We hold to be totally *illegal*.

RULE That the *Poſtea* be delivered to the PLAINTIFF.

Thomas *verſ.* Powel.

Friday, 5th May 1758.

A Feigned Iſſue had been agreed upon, between the Parties and by Approbation of the Court, in order to try a Corporation-Right.

This feigned Iſſue had been now tried: And it was found for the Proſecutor in the Original Motion for the Information in the Nature of a *Quo Warranto*.

The Queſtion now was, (upon a Motion for the Direction of the Court, to the Maſter,) Whether the Proſecutor ſhould have ALL *his Coſts previous to the feigned Iſſue*; or *any* and *what Part of* them: Or whether he ſhould *only* have his Coſts FROM the *feigned Iſſue*.

Mr. *Aſton* and Mr. *Nares*, who were Counſel for the Plaintiff, inſiſted to have *All* the Coſts: *Viz.* Coſts of the *Original Application*; alſo Coſts of *ſettling the Iſſue*, (which had been diſputed and ſquabbled about;) as well as the Coſts of the Trial of the Iſſue, in the Common Courſe. They cited * *Rex* v. *Griffiths*, *M.* 1755, 29 *G.* 2. *B. R. Rex.* v. *Juſtices of Walſall, alias Stubbs et al'* v. *Nichols et al'*, *Tr.* 1755, 28 *G.* 2. *B. R. Herbert* v. *Williams*, *P.* 25 *G.* 2. *B. R. Baſkerville* v. *Redding*, there cited. And 1 *Strange* 33. *Dominus Rex* v. *Powel et al'*. (Which laſt was only to ſhew that an Information in the Nature of a *Quo Warranto*, is to be conſidered as a Civil Suit, with regard to Coſts.) * P. 604.

And they ſaid that this being of the Nature of a *Civil* Suit, in the Original Application to the Court, was different therefore from Caſes where the Original Application was of a *Criminal* Nature, where *no Coſts were payable* by the Defendant.

Mr. *Morton*, on Behalf of the Defendant, denied that *any more* Coſts ought to be here taxed, than *merely* thoſe *of the feigned Iſſue*; and even thoſe, *only* from the Time of the Iſſue *joined*.

For he inſiſted that the Original Rule "to ſhew Cauſe "why the Information ſhould not be granted," was *actually* DISCHARGED, even *before* this feigned Iſſue was agreed upon as a proper Method of Trial of the Right: So that there

there was no Pretence for the Coſts of *that* Application being now included. And the Diſputes about the Perſon to be made Defendant in the feigned Iſſue, were, and could not but be, *prior* to its being *joined*.

Mr. Juſt. DENISON and Mr. Juſt. WILMOT were clear that the Coſts to be taxed upon ſuch a feigned Iſſue, were ONLY the Coſts *of the feigned Iſſue itſelf*, and NOT any Coſts *antecedent* to the *Conſent* to "try the Right in a feigned "Iſſue." And this was ſettled (as Mr. Juſt. *Wilmot* ſaid) in the Caſe of *Walſall*. *

*It was ſo; on 2 June 1755, Tr. 28 G. 2.

And they *Both* ſaid, That it would be endleſs to enter into the Coſts *previous* to the feigned Iſſue: For they would always be ſure to have Diſputes, "Which Party was "right, And which wrong, at firſt and upon the Original "Motion."

LORD MANSFIELD concurred in their Opinion: Which He explained to mean, (and to which they aſſented,) "*from* "*the Time* when the feigned Iſſue was FIRST *Ordered and* "*agreed to.*"

Note—In the preſent Caſe, the Coſts of the Diſputes about *ſettling* the feigned Iſſue, AFTER *it* was agreed upon and Ordered, were conſidered as *Part of* the Coſts which were to be taxed to the Plaintiff; (who had *prevailed* in the Queſtions diſputed, both before the Maſter, and before the Court.)

* P. 605.

* Dearden, Aſſignee &c. *verſ.* Holden.

THE Queſtion was, "Whether a Plea of the Statute of 23 *H.* 6. *c.* 10. (againſt Sheriffs taking Bonds *Co-* "*lore Officii &c.*) And that this Bond was taken for Eaſe "and Favour *&c*; be or be not an ISSUABLE *Plea*, within "a Judge's Order giving the Defendant Time to plead, up- "on the *uſual Terms* of pleading an *iſſuable Plea*, *&c.*"

In the preſent Caſe, the Plaintiff had *ſigned Judgment*, upon the Defendant's having *thus* pleaded, under the *uſual* Order from a Judge, "for Time to plead, on the common "and uſual Terms:" For the Plaintiff conſidered this Plea, as a *Nullity*; and now inſiſted that it was ſo; and therefore that he had a Right to ſign Judgment, without giving any Rule to plead.

But the MASTER reported this Judgment to be irregular: And to this, The COURT alſo aſſented—For

Per Cur'

Per Cur' This *is* an *iſſuable* Plea: For if the Plaintiff had taken Iſſue "That the Sheriff *did* NOT let the Defendant "go, for Eaſe and Favour," It would have brought all Matters ſuggeſted in the Plea, to Iſſue.

The Judge's Order does *not confine* the Defendant to plead the GENERAL *Iſſue*. The preſent Plea is within his Order: And the Plaintiff *might* here have taken Iſſue (as above) "That the Sheriff did *not* let the Defendant go, "for Eaſe and Favour:" Which would have let in all the Matters in Iſſue.

RULE "for ſetting aſide the Judgment, with Coſts," MADE ABSOLUTE.

But it being ſuggeſted by the Plaintiff's Counſel, "That "the Plea was in Truth and Reality, only a *Sham* Plea, "put in merely to gain Time;"—

Mr. *Norton*, on Behalf of the Plaintiff, moved that the Defendant might *plead as he would ſtand by*.

Which, being conſented, on Behalf of the Defendant, *This* alſo was made Part of the RULE.

The End of *Eaſter* Term 1758. 31 *Geo.* 2.

Trinity

* P. 606.

* Trinity Term

31 Geo. 2. B. R. 1758.

Friday, 26th May 1758.

Rex *verſ.* James Clarke, Eſquire.

A *Habeas Corpus* had been iſſued during the laſt Vacation, by Lord *Mansfield*, bearing Teſte the 8th Inſtant, being the laſt Day of the preceding Term, directed to *James Clarke*, Eſquire, commanding him to have *before his Lordſhip* AT HIS CHAMBERS in *Serjeants Inn*, immediately, the Body of *Lydia Henrietta Clarke*, his Daughter, then detained in his Cuſtody, together with the Day and Cauſe of her Taking and Detainer; then and there to undergo and receive what his Majeſty's ſaid Chief Juſtice ſhould then and there conſider of concerning her in this Behalf.

The Writ was now returned *here in Court:* and the ſaid *Lydia Henrietta Clarke* produced.

Mr. *Clarke* the young Lady's Father, *returned* That She was *his* DAUGHTER; and that on the 22d of *March* laſt, She, without any Leave or Notice to Him or to his Wife (her Mother,) ſecretly went away from his Houſe in *Great Ormond Street*, and took with her a Box or Bundle containing ſeveral Sorts of Wearing-Apparel and about 27*l.* in Money.

That, in about 12 or 14 Days time, He, being credibly informed "That his ſaid Daughter had been INVEIGLED "*away* from him *by the Inſtigation* of one *James Mervin*, "a Perſon of NO *viſible Occupation or Subſtance*, nor keeping "any Houſe; *with* DESIGN *to* MARRY *her to One Joſeph Iſ-* "*grave*, who is under Age, and who about two Years ago "*ſerved* the ſaid *James Clarke as a* FOOT-BOY, and *is yet* "*in no better Condition*; and that they were all gone together "into the Iſle of *Thanet*, where they were *to get a* LICENCE "*for ſuch a Marriage*;" He being under great Concern for the Welfare of his ſaid Daughter, and in Order to *prevent the*

* *the ſaid Marriage*, (She being *intitled to a conſiderable Fortune*, after her ſaid Mother's Death, and being likewiſe *his* ONLY *Child,)* took a Journey to find them out, and (if in his Power) *to prevent the ſaid intended Marriage*; and gave Directions to his Nephew Mr. *Peter Starkie Floyer*, to go in queſt of them, and if he found them, to endeavour to prevent the Marriage and to bring the ſaid Daughter to Him. * P. 607.

That his ſaid Nephew found them out at a Place called *Broad Stairs*, in the Iſle of *Thanet*: Where the ſaid *James Mervin* repreſented himſelf as, and *paſſed for*, the Uncle of his ſaid Daughter.

That the ſaid *Lydia Henrietta Clarke* came Home with his ſaid Nephew to his (the ſaid *James Clarke*'s) Houſe in *Great Ormond Street*; Where ſhe arrived the 7th of *April* laſt: and the ſaid *James Mervin* came with her as far as *Canterbury*. But the ſaid *Joſeph Iſgrave* run away: and the ſaid *James Mervin* pretends He is gone to *Holland*.

That on her being thus brought Home to him, He did' in the *tendereſt Manner*, repreſent to Her the Ruin She was inevitably falling into, if She purſued a Deſign to marry a Perſon ſo much inferior to herſelf; and who, having no viſible Way of Livelihood, muſt reduce her to the utmoſt Neceſſity and Want, as well as Diſgrace and Shame. Whereupon She aſſuring her ſaid Father "That She was *not* mar-"ried," He, through his Duty as a Parent, and from the Affection he bore towards her, did receive her into his Houſe; and the *mildeſt and beſt Endeavours* have been uſed, *to diſſuade Her from ſuch Marriage*; *ſuch Endeavours extending no further* than what he humbly conceives to be conſiſtent with that parental Care which *may* be uſed *by a Father* towards his Child: And NO SEVERITY *whatſoever* hath been uſed to Her.

The She hath, ever ſince the ſaid 7th Day of *April* laſt, (when ſhe came Home to his Houſe as aforeſaid) hitherto, OF HER OWN ACCORD, continued to live and reſide with Him (her Father) and ſtill doth live and reſide with him, at his ſaid Houſe, *of* HER OWN ACCORD *and under* NO *Reſtraint whatſoever.*

And there is no other Cauſe of detaining the ſaid *L. H. C. &c.*

Note—This *Habeas Corpus* was iſſued upon an Affidavit mode by the above named *James Mervin*; who made out a very *plauſible* Caſe, fully ſufficient, (if true) to obtain the Writ; but which was now alledged by Mr. *Norton*, (of Counſel with Mr. *Clarke)* to be abſolutely and utterly FALSE *in Fact.*

In

* P. 608. * In it the young Lady was ſworn to be of *full Age*, (*viz.* about 22;) which was true: But it *alſo* alledged "that She had been *hardly uſed*, and *confined*, by her "Father," and *other Circumſtances* which were falſe.

Note alſo—That although this *Habeas Corpus* directed Her to be brought before *Lord Mansfield* AT HIS CHAMBERS; and although She *was actually brought* before *Him* whilſt He was ſitting at *Guildhall*, on *Wedneſday* laſt; Yet, the Father deſiring to have an Opportunity to take the Advice of Counſel, in ſettling the Return; And the Young Lady declaring publickly, "She had no Objection to continue with her Fa-"ther, who had always uſed her with great Tender-"neſs, and much better than ſhe deſerved;" His Lordſhip judged it proper to *adjourn* it, and direct Her to be brought *into Court* the firſt Day of Term; the rather too, that She might have a Chance of being better adviſed: For if ſhe had been then taken from her Father, it was plain She would have purſued her improvident Deſign; and *Mervin* appeared at *Guildhall*, ready to have carried her off. She was *now brought into* COURT by *Virtue of the* SAME *Writ*, which was returnable *before* HIS *Lordſhip, at his* Chambers *immediate*.

Lord MANSFIELD now only aſked Her, "whether She "deſired to continue with her Father, or to go elſewhere."

She anſwered—"To *continue* with her Father."

Upon which, the Court told Her, She was at Liberty to go. Which She accordingly did.

Then Mr. *Norton* moved that *Mervin's Affidavits* might be FILED, (together with the Return of the Writ;) as Mr. *Clarke* was determined to proſecute him for *Perjury*.

The COURT ordered it to be ſo; and recommended the Proſecution very ſtrongly to Mr. *Clarke*.

Wilford

* Wilford *verſ.* Berkeley. * P. 609.

Saturday, 27th May 1758.

MR. *Morton*, on Behalf of the Defendant, moved for a *new Trial*, for EXCESSIVENESS *of Damages*. It was an Action for CRIMINAL CONVERSATION with the Plaintiff's Wife: And the Jury (a Special One) had given 500*l.* Damages. The Defendant was a Clerk in the Exchequer, during Pleaſure, at a Salary of 50*l.* a Year, only: Which was his *whole Subſiſtence*.

The Court were, All * Three, clear and unanimous, That although there was no Doubt of the Power of the Court to exerciſe a proper Diſcretion in ſetting aſide Verdicts for exceſſiveneſs of Damages, *in Caſes where* the Quantum of the Damage really ſuffered by the Plaintiff could be *apparent*, or they were of ſuch a Nature that the Court could *properly Judge of the Degree* of the Injury, and could *ſee manifeſtly* that the Jury had been outrageous in giving ſuch Damages as greatly exceeded the Injury, ; Yet the Caſe was very different, where it depended *upon Circumſtances which were* PROPERLY and SOLELY *under the Cognizance* of the *Jury*, and were FIT to be ſubmitted to *their* Deciſion and Eſtimate. And they held the Caſe of Criminal Converſation with another Man's Wife to be of this *latter* kind. For the Injury ſuffered by the Huſband, and the Eſtimate of the Damages to be aſſeſſed muſt, in their Nature, depend entirely upon CIRCUMSTANCES, which it was ſtrictly and properly the Province of the Jury to judge of: And in the preſent Caſe, the Court could not ſay that 500*l.* was too much; or that 50*l.* would have been too little.

* Mt. Juſtice *Feſter* was abſent.

Note—The Caſe of *Chem* v. *Brigg*, *M.* 6 *G.* 1. *B. R.* before Ld. Ch. J. *Pratt*, was exactly ſimilar to this; and the very ſame Sum of 500*l.* was given: And the like Motion was rejected then, upon the ſame Principles as the Court have now rejected the preſent One.

MOTION DENIED.

Rex *verſ.* Little.

Saturday, 3d June 1758.

In the Crown Paper.

THIS was a *Conviction*, returned to a *Certiorari* directed to *William Bailye* Eſq; a Juſtice of Peace for the City and County of *Litchfield*, for offering to ſell Goods &c. as

*P. 610. *as a *Hawker and Pedlar*, without *Licence*, contrary to the Statute in that Caſe made and provided.

It was dated 24*th October* 31 *G.* 2. and ſet forth that One *Thomas Preſton* Gentleman came before the ſaid Juſtice (*William Bailye* Eſq;) and gave him Information, that One *Thomas Little* (in the Writ named) after the 24th of *June* 1698, that is to ſay upon the ſaid 24th Day of *October* 1757, in the Pariſh of St. *Mary* in the ſaid City and County of the ſaid City of *Litchfield*, was *found Offering to Sale Silk Handkerchiefs*, AND *trading* AS *an Hawker Pedlar or Petty Chapman*; AND *that the ſaid Thomas Little* DID *then and there* OFFER *to ſell a Parcel of Silk Handkerchiefs*; And that he the ſaid *Thomas Little did* NOT, although required ſo to do, PRODUCE *any Licence*, as the Law in that Caſe made and provided directs, to qualify him for his *ſaid Trading*: And the ſaid *Thomas Preſton* then and there prayed that he the ſaid *Thomas Little* might be thereof convicted, according to the Form of the Statute in ſuch Caſe made and provided. Whereupon the ſaid *Thomas Little* being brought before Me, and being then and there preſent, and having heard the ſaid Information read, and being charged therewith, He the ſaid *Thomas Little* is then and there aſked by me the ſaid *William Bailye*, "if he hath any thing to ſay, or can "ſay any thing, Why he the ſaid *Thomas Little* ſhould not "be convicted of the SAID *Offence ſo charged upon him in* "*Form aforeſaid*, according to the Form of the Statute in "ſuch Caſe made and provided." Whereupon he the ſaid *Thomas Little* doth now here freely and voluntarily CONFESS, before Me the ſaid *William Bailye* the Juſtice aforeſaid, "That he the ſaid *Thomas Little* DID *offer to ſell Silk* "*Handkerchiefs to the ſaid Thomas Preſton*, in SUCH MAN-"NER *as is mentioned in the aforeſaid Information*;" and "*that he hath* NO *Licence* for ſelling thereof." And the ſaid *Thomas Little* is now here required by me the ſaid *William Bailye* the Juſtice aforeſaid, *to* PRODUCE *a Licence* granted to him to impower or qualify him *to travel or trade*, purſuant to the Statute in that Behalf made and provided. And he the ſaid *Thomas Little* doth NOT *produce* before Me any *ſuch Licence* or *any Licence* granted to him in *that* Behalf. And the ſaid *Thomas Little* doth not pretend or alledge that he is the real Worker or Maker of the ſaid Goods, or the Child, Apprentice, Agent or Servant of or to any ſuch Worker, or Maker: *Nor doth alledge any other Matter* in his Defence.

Whereupon, and upon due and full Conſideration by me had, of and upon the ſaid Matters and Premiſſes, I do adjudge that the ſaid *Thomas Little* IS *an Hawker*, within the true Intent and Meaning of the Statute in ſuch Caſe made and provided: And it manifeſtly appeareth to me the ſaid Juſtice "That the ſaid *Thomas Little is* GUILTY *of the* OF-"FENCE *in the ſaid Information above laid to his Charge*,

"*in*

* " *in Manner and Form* as by the ſaid Information is above " alledged." * P. 611.

Therefore it is conſidered and adjudged by me the ſaid Juſtice, That the ſaid *Tho. Little* be, and he is convicted by me OF THE SAID PREMISSES *in the ſaid Information ſpecified*, above laid to his Charge, according to the Form of the Statute in that Caſe made and provided; And that the ſaid *Tho. Little* forfeit the Sum of 12*l. for his ſaid Offence*; to be levied and paid according to the Form of the Statute in that Caſe made and provided. In Witneſs, *&c.*

William Bailye (L. S.)

V. 8, 9 *W.* 3. *c.* 25. § 1, 2, 3. and 9, 10 *W.* 3. *c.* 27. § 1, 2, 3. and 12 *W.* 3 *c.* 11. *V.* alſo 3, 4 *Ann. c.* 4. §. 1, 4. for continuing theſe Duties: Which refers to the Deſcription in the former Acts.

Mr. *Yates*, on Behalf of the Defendant, took two Exceptions,

1ſt, That the Defendant is not brought within the Deſcription of the Acts, as *going from Town to Town &c.* and *travelling &c:* But he is only *generally* deſcribed to be a Perſon that *traded* AS *a Hawker and Pedlar*, and offered to ſell a Parcel of Silk Handkerchiefs to the Informer.

2d Exception. That there is *no Evidence* at all of his Guilt: For it is a Conviction upon a Confeſſion; And the Confeſſion *extends no further* than barely to the ſimple Fact of offering to Sale Silk Handkerchiefs to the ſaid *T. Preſton* in *ſuch Manner* as is charged upon him. But that Charge is an *inſufficient* One.

Firſt—He cited 1 *Strange* 497, 498 *Rex* v. *Sparling*, A Conviction for profane Curſing and Swearing was held bad, for not ſpecifying the Oaths and Curſes: For the *Court*, NOT *the Witneſs*, were to judge of their being profane. So here, the *Court*, not the Witneſs, are to be the Judges Whether he was a Hawker, Pedlar, or Petty Chapman, within the Deſcription of the Acts of Parliament.

So, in the Caſe of *Colebourne* v. *Stockdale* there cited and reported in 1 *Strange* 493; Civil Action of Debt on Bond; And Plea " that Part of the Money was won by Gaming; " contrary to the Statute;"—It was adjudged that the *Game played at*, ought to be mentioned in the Plea: For it is *Matter of Law*, and *not* barely Evidence. So, in Convictions for killing Game not being qualified, The want of the due Qualifications muſt be *negatively* ſpecified, And He cited the Caſe of *Rex* v. *Chapman*, 30th *April* 1755; A Conviction on 43 *Eliz. c.* 7. for robbing an Orchard; " the " ſaid Robbing *not being* Felony, by the Laws of this Realm:"

* P. 612. * This was holden not to be a ſufficient Charge for the Court to judge upon. *Rex* v. *Burnaby*, 2 *Ld. Raym.* 900, 901. was a Conviction on the ſame Act of Parliament of 43 *Eliz. c.* 7. for cutting down Trees without mentioning the Number: And it was holden inſufficient; and laid down as a Rule, that Convictions ought to be *certain* and are always taken *ſtrictly*.

Second Exception. All the Evidence to ſupport this Conviction is the Confeſſion of the Party: And that is only "That he did offer to ſell Silk Handkerchiefs to the ſaid "*Thomas Preſton in the Manner charged* upon him in the In- "formation." But it does not appear by the preceding Charge "That he was a Hawker Pedlar or Petty Chap- "man," SUCH *as is deſcribed* by the Acts of Parliament: And if not, he cannot be liable to this Penalty.

Mr. *Luke Robinſon* for the Conviction.

This Queſtion depends, and the Conviction is founded upon the following Acts of Parliament: 8, 9 *W.* 3. *c.* 25. 9, 10 *W.* 3. *c.* 27. which is in the very ſame Words, and is now in Force, and 3, 4 *Ann. c.* 4. §. 4. *pa.* 116.

And 1ſt. The Defendant is ſufficiently brought *within the Deſcription* of theſe Acts. The Selling Silk Handkerchiefs is only *One Overt Act* of his Trading, which is ſpecified by the Conviction. And the *Juſtice* of Peace is to judge Whether the Perſon is or is not a Hawker or Pedlar or Petty Chapman. And He has adjudged him to be a Hawker *within* the true Intent and Meaning of the Act of Parliament.

2dly. The Defendant has confeſſed the Charge, *as laid*; and that He had no Licence *&c.* If he had any Defence, he ought to have made it, before the Juſtice.

And theſe Convictions upon the *Revenue*-Laws ought *not* to be taken *ſo ſtrictly* as others. For which, he cited what is laid down in 1 *Ld. Raym* 581. *Rex* v. *Chandler Per Holt* Ch. J. "That the Juſtices are not confined to legal Forms, in "theſe Caſes: It is enough to purſue the *Intent* of the Act."

And the Court will *preſume* the Conviction to be right, unleſs the contrary appears upon the Face of it. And ſo is 1 *Strange* 608. *Rex* v. *Theed*: Where the Court *preſumed* that the Officer came *by Day*, and not by Night; becauſe no ſuch Thing as Coming in the Night was apparent upon the Face of the Conviction.

He

* He ſaid that Mr. *Yates*'s Caſes are not *ad idem*. In Game-Convictions it is not neceſſary to ſet out negatively, "That he had *not* ſuch and ſuch Qualities." Nor is it neceſſary to ſet out the particular Oaths and Curſes, in Convictions for profane Curſing and Swearing: Nor in *Chapman*'s Caſe, was it neceſſary to ſet out that it was not Felony by Law. * P. 613.

Mr. *Yates* in Reply.

1ſt. Urged the Neceſſity and Reaſonableneſs of ſpecifying the Act of Trading &c, in the Conviction. But this Man was *not*, in Fact, *within the Definition of going from Town to Town, and travelling*: For he reſided at a *fixed Place*.

In Game-Convictions, it *is* neceſſary to *ſpecify negatively* and *particularly*, "That the Defendant was not ſo and ſo "qualified."

Mr. Juſt. DENISON—That has been ſo ſettled.

Mr. *Yates* proceeded in his Reply.

2dly. The Confeſſion is only "That he did offer to ſell "Handkerchiefs &c:" *Not* "That he TRADED *as a Hawker Pedlar* or Petty Chapman."

Lord MANSFIELD. The Act of 3, 4 *Ann.* refers to the Deſcriptions in thoſe of *W.* 3.

A SINGLE *Act* of ſelling a Parcel of Silk Handkerchiefs *to a particular Perſon*, is not a Proof that he was SUCH a Hawker Pedlar or Petty Chapman, as ought to take out a Licence, by Virtue of theſe Acts of Parliament.

Now it is certainly of the ESSENCE *of the Crime* "of NOT "PRODUCING a Licence," That he muſt be SUCH a Perſon as OUGHT *to take out* a Licence.

And the *Confeſſion* is only of the *Fact*, "That he ſold "the Handkerchiefs to *Thomas Preſton*:" Not "That he "TRADED as a Hawker &c."

Convictions ought to be taken *ſtrictly*: And it is reaſonable that they ſhould be ſo; *becauſe* they muſt be taken to be true, againſt the Defendant; and therefore ought to be conſtrued with *Strictneſs*. I do not ſay that it is neceſſary to *define exactly, What* a Hawker Pedlar or Petty Chapman *is*. But it is neceſſary to alledge and ſhew that he ſold the Goods, or traded, AS *One*. * V. poſt, 2279 p. Rex v. Uriah Corden, Hil. 1769. accord.

* P. 614. * Mr. Juſt. DENISON concurred, for the ſame Reaſons; and thought the *Material* Averment to be here *wanting*; it not being averred "That he was *ſuch* a Hawker Pedlar or "Petty Chapman as ought to take out a Licence."

And He mentioned a Caſe of *Rex* v. *Gardiner*, *Tr.* 1738, 11, 12 *G.* 2. *B. R.* Where the Juſtice convicted a Man of keeping a Gun, BEING an Inſtrument to deſtroy Game. And ſo it certainly was: But, in Fact, the Man had never uſed it *as* ſuch; but only to keep Pigeons off from his Grounds. And the Conviction was quaſhed.

Mr. Juſt. WILMOT concurred clearly, for the ſame Reaſons. For certainly a Man may ſell Goods *as* a Hawker Pedlar or Petty-Chapman, without being *ſuch* a Perſon as is *obliged* to take out *a Licence*. And *if* he is not obliged to *take out* a Licence, moſt undoubtedly he ought not to be convicted in a Penalty for *not* PRODUCING One.

Now here, it appears, that the Juſtice has convicted the Man of an Offence, of Which He has not proved him to be guilty.

* Mr. Juſtice *Foſter* was not preſent.

Per Cur. * unanimouſly,
CONVICTION QUASHED.

Tueſday, 6th June 1758.

Doe on the Demiſe of Hitchings and another, *verſ.* ——Lewis Eſq;

THIS was a Special Caſe from the Aſſizes, upon an Ejectment brought by a Tenant againſt his Landlord, who had formerly obtained a Judgment by Default, in a former Ejectment brought by Him againſt this ſame Tenant.

The Special Caſe ſtated for the Opinion of the Conrt was as follows.

Thomas Lewis, being ſeiſed in Fee, demiſed to *John Hitchings* (in Conſideration of a Fine &c. of 49*l.* 13*s.* 6*d.*) To hold for 99 Years, if Three Perſons ſhould ſo long live; at 11*l.* 5*s.* payable at *Michaelmas* yearly; ſubject to a Proviſo that if the Rent ſhould be in Arrear &c. for the ſpace of one Month, being lawfully demanded; and no ſufficient Diſtreſs upon the Premiſſes &c &c; That then it ſhould be lawful to the ſaid *Thomas Lewis* his Heirs and Aſſigns, to re-enter &c. That

* That *John Hitchings*, the Leſſee, entered and was poſ- * P. 615.
ſeſſed &c; And then Died; having firſt made his laſt Will and Teſtament &c; Whereby he deviſed the ſaid Term to his Son *Edward Hitchings* (the Leſſor of the Plaintiff;) and made his Wife Executrix. The Teſtator's Wife, his Executrix, duly proved the ſaid Will and duly aſſented to the Legacy: And the ſaid Deviſee *Edward Hitchings*, the Leſſor of the Plaintiff, entered into the Premiſſes, and became poſſeſſed of the ſaid Term, being then and ſtill unexpired; and continued in Poſſeſſion, till the 15th of *April* 1737.

Thomas Lewis, the original Leſſor, by his Will, &c, deviſed to ſeveral Truſtees, &c, in Truſt for *Morgan Lewis*, an Infant, &c. The ſaid *Thomas Lewis* died ſeiſed &c: And the ſaid Deviſees in Truſt became ſeiſed &c. And there being 3 Years *Rent due and in Arrear* from the ſaid *Edward Hitchings* for and upon the Premiſſes, a Declaration in Ejectment was *ſerved upon the ſaid Edward Hitchings*, UNDER *and* BY VIRTUE *of* the Statute of 4 *G.* 2. *c.* 28. for the ſaid Premiſſes, on the Demiſe of the Truſtees and Deviſees aforeſaid: And Judgment was obtained thereupon, *by Default*, againſt the CASUAL *Ejector*; and a Writ of Poſſeſſion iſſued thereupon; And Poſſeſſion was delivered according to the ſaid Writ, to the ſaid Truſtees, on the ſaid 15th of *April* 1737: Which ſaid Truſtees have been in Poſſeſſion of the Premiſſes *ever ſince*. And the ſaid *Edward Hitchings* (the now Leſſor of the Plaintiff) has not ſince paid nor tendered the Rent in Arrear or any Part thereof, nor the Coſts; nor filed any Bill for Relief in Equity.

On the Trial of this *ſecond* Ejectment now brought by *Edward Hitchings* againſt the ſaid *Lewis*, *no Affidavit was* PRODUCED, "That half a Year's Rent was due before the "*firſt* Declaration in Ejectment was ſerved upon the ſaid "*Edward Hitchings*; and that no ſufficient Diſtreſs was to "be found on the demiſed Premiſſes, countervailing the "Arrears then due; And that the Leſſors in that *firſt* E-"jectment had Power to re-enter."

On this Trial of the ſaid ſecond Ejectment, (*viz.* the Ejectment brought by the ſaid *Edward Hitchings*,) A Verdict was found for the Plaintiff; but ſubject to the Opinion of this Court, "Whether or no the Plaintiff therein ought "to recover."

This general Queſtion—

"Whether *Edward Hitchings* the Leſſor of the Plaintiff "in the preſent Ejectment ought to recover, or not;" depended upon the following

Queſtion:

* P. 616. * Queſtion: *Viz.* "Whether it was neceſſary for the "Defendant Mr. *Lewis* to PRODUCE an *Affidavit* That "Half a Year's Rent was due *&c. ut ſupra*; And that the "Leſſors in that former Ejectment had Power to re-enter."

Mr. *Nares*, who argued for the Plaintiff, made two Queſtions: *viz.*

1ſt. How far this Caſe is within the 2d Section of 4 *G.* 2. *c.* 28. "for the more effectual preventing Frauds com-"mitted by Tenants, and for the more eaſy Recovery of "Rents, *&c.*"

2d. Queſtion. If it is within it, then how far the Plaintiff has proved his Title under that Statute, upon the particular Circumſtances of this Caſe.

The Firſt Point may be rendered the more clear, by conſidering how it ſtood before the Statute; and how ſince.

1ſt. *Before* that Statute, the Plaintiff in Ejectment muſt have proved "that there was Rent in Arrear:" and "that "there was no ſufficient Diſtreſs to be found upon the Pre-"miſſes;" and, thirdly, "that he had made a lawful De-"mand of the Rent in Arrear."

This Condition here annexed to the Leaſe in the preſent Caſe, is in Derogation of the Party's own Grant, and tends to defeat the Eſtate: And therefore Mr. *Lewis* would have been kept ſtrictly to prove all theſe previous Facts. And if it had been a Judgment againſt the *Caſual* Ejector; the Judgment would have been no Bar againſt the *real* Tenant, in an Action for the *meſne Profits*. Indeed if the Judgment had been obtained againſt the *Real* Tenant, or againſt the *Owner* of the Eſtate, the Perſon who obtained ſuch a Judgment needed not prove any Thing over again, in an Action for the meſne Profits. And ſo the Lord Ch. J. at *Niſi prius* at *Guildhall*, in 2 *Strange* 960. *Jefferies* v. *Dyſon*, * expreſsly lays down this Diſtinction. And here the *real* Tenant did not enter into the Rule: But it is *res inter* ALIOS *acta*.

* See this Caſe ſtated at large, by Mr. Juſtice *Deniſon*, *poſt*. 619.

This Judgment in Ejectment had therefore (before the Statute) no relation to the *real* Tenant: And conſequently, Mr. *Lewis* muſt have *ſhewn his Title* to re-enter.

Then to conſider the Caſe as *ſubſequent* to the Statute, here is *not* an Acquieſcence of 20 Years. And what ſeeming Acquieſcence there was, aroſe from the Poverty of the Party,

2dly.

*2dly. The next Point in Queſtion is, "Whether ac- * P. 617.
"cording to the State and Circumſtances of this Caſe, it
"can be conſidered as a Caſe *within* the Statute; and that
"the Plaintiff has proved a Title *under* the Statute."

The Court will *not preſume* any Thing, in Support of a Judgment obtained by Confeſſion or Default, or in any other Way than upon a *Trial of the Merits*. *Skinner* 586. *Sanders's* Caſe is a proof of this: Where *Holt* Ch. J. makes the like Diſtinction.

An Inconvenience would ariſe from too great a Latitude in conſtruing this Statute. As in Caſe of *Fraud and Connivance*, in recovering the Judgment againſt the Caſual Ejector: It would be very hard, if in *ſuch* Caſe, the real Tenant could not bring an Ejectment.

Mr. *Nares* was now departing from the Facts ſtated in the Caſe; in which he ſaid it was omitted to be inſerted "That there *was* ſufficient Diſtreſs."

Lord Mansfield—We muſt judge upon the Caſe as *ſtated*: if it is miſ-ſtated, You muſt apply to amend it. However, I do not ſee that this would be very material.

He obſerved that it was alſo ſtated, only, "That no Af-
"fidavit was PRODUCED: Not "That there *was* no
"Affidavit *at all*." Alſo that Preſumptions are not dependant upon certain fixed Rules; but muſt be guided by Circumſtances: and ſuch Circumſtances are proper for the Conſideration of a Jury.

[Here was an Acquieſcence of 20 Years within a few Months. And it is ſtated to be a Caſe "*within* the
"Act of Parliament;" Which is a material Part of the Caſe. The Ejectment is ſtated to have been ſerved "*under and by Virtue of* this Act."]

Mr. *Morton* was beginning to ſpeak on Behalf of the Defendant: But

Lord Mansfield told him that the Caſe was ſo clear on his Side of the Queſtion, that it was not neceſſary for him to give himſelf any Trouble.

Then his Lordſhip repeated the Caſe exactly as it was ſtated: (Which ſee, *ante pa.* 614, 615.)

The

* P. 618. * The *General* Queſtion "Whether the Plaintiff in this "laſt Ejectment ought to recover," depends upon this particular Queſtion, *viz.* "Whether the firſt Ejectment was "*regularly* brought and proceeded upon, by the Truſtees "under *Thomas Lewis*'s Will, purſuant to the Directions "ſpecified in the Act of 4 *G.* 2. *c.* 28. § 2." This laſt Ejectment is brought near 20 Years after the former.

Now, beſides the GENERAL *Preſumption* "That the "Proceedings were regular and *omnia ſolemniter acta*, un-"*leſs* ſomething had appeared to the contrary;" and the Rule "That *ſtabitur præſumptioni*, donec *probetur in contra-*"*rium*;" Here is, in this Caſe, a DECISIVE *Fact* ſtated: Which Fact is "That the Proceeding under the firſt Eject-"ment *was* UNDER *and* BY VIRTUE *of this Act* of Parlia-"ment."

Indeed *Edward Hitchings was in Poſſeſſion*, as appears by the Caſe ſtated, *till* the 15th of *April* 1737, the Time when Poſſeſſion was delivered (by Virtue of the Writ of Poſſeſſion) to the Truſtees. So that, being the Tenant in Poſſeſſion, he MUST *have been ſerved* with the Declaration in Ejectment; Whether it was a Common Law-Proceeding, or a Proceeding upon this Act of 24 *G.* 2.

But the Caſe itſelf ſtates it to have been a Proceeding UNDER *this Act*: And if it was ſo, the Judgment MUST *have been founded* upon ſuch an Affidavit as that Act expreſsly directs and requires, *viz.* An Affidavit "That half a Year's "Rent was due, before the Declaration in Ejectment was "ſerved; and that no ſufficient Diſtreſs was to be found "upon the demiſed Premiſſes, countervailing the Arrears then "due; and that the Leſſors in that Ejectment had Power "to re-enter."

And the Caſe does not ſtate, affirmatively, "That the "Judgment was IRREGULAR;" or, expreſsly and explicitly, "That there was *No* Affidavit at all;" or indeed any Thing whatſoever, *to* TAKE OFF *a Preſumption* which is *immenſely ſtrong* the other Way. For *Edward Hitchings acquieſced under* this Judgment, Execution, and Poſſeſſion, for *almoſt Twenty Years*, and *never tendered* the Rent and Arrears, together with Coſts (purſuant to the Act;) nor filed any Bill for Relief in Equity, within ſix Months after the Execution executed, nor indeed at any ſubſequent Time. So that he is barred by the Statute, and fore-cloſed from all Relief or Remedy in Law or Equity, (other than by Writ of Error;) and the Landlord is by Virtue of the Act of Parliament to hold the Premiſſes diſcharged from the Leaſe; upon Suppoſition that his former Proceedings were regular.

The

* The Affidavit may be *loſt*, after this Length of Time; * P. 619.
Or the Landlord may be unable to *come at* it; although there were, in Fact, a proper one made, to ſupport his Judgment and Execution: And it would be too hard, to put the labouring Oar upon the Landlord, of PROVING *the Regularity* of all the Circumſtances upon which his Judgment and Execution were founded.

As to what has been ſuggeſted (*v. ante* 617,) "That "there may be *Fraud Connivance*, or *Colluſion* with the Under-tenant, in the Manner of Recovering Judgment againſt "the Caſual Ejector;" It is merely imaginary, in the *preſent* Caſe. Beſides, *Fraud will infect every Thing:* And upon the Principles of *Fermor*'s Caſe, 3 *Co.* 77. it would not ſtand.

There can be no Suſpicion of any ſuch Thing here. For this *Edward Hitchings*, the preſent Leſſor of the Plaintiff, the Perſon who has thus long acquieſced under this Judgment and Execution, and never attempted to be relieved from it either at Law or in Equity, is Himſelf the VERY MAN *upon whom* the Declaration in the firſt Ejectment was ſerved.

The true End and profeſſed *Intention of this Act* of Parliament was to *take off* from the Landlord the Inconvenience of his continuing always liable to an Uncertainty of Poſſeſſion, (from its remaining in the Power of the Tenant to offer him a Compenſation at *any* Time, in order to found an Application for Relief in Equity;) and to *limit and confine* the Tenant to Six Calendar Months after Execution executed, for his doing this; or elſe, that the Landlord ſhould from thenceforth hold the demiſed Premiſſes diſcharged from the Leaſe.

His Lordſhip was therefore clearly of Opinion "that in "this Caſe, the Plaintiff ought *not* to recover."

Mr. Juſt. DENISON concurred in Opinion "That the "Plaintiff had *no* Title to recover."

The former Ejectment brought by the Landlord againſt *Edward Hitchings* the Tenant, who is now become Leſſor of the Plaintiff in the preſent Ejectment, is ſtated to have been ſerved upon *Hitchings* "*under and by Virtue of* this Act of "4 *G.* 2. *c.* 28." Now this Act (*v* § 2.) expreſsly recites "That great Inconveniences frequently happen to Land-"lords, in Caſes of Re-Entry for Non-Payment of Rent, "from the many Niceties attending Re-Entries at *Common* "Law; and that Expences and Delay often happen from "Injunctions out of Equity, after Judgment in Ejectment:"

And

* P. 620. * And the Act is profeſſedly made in order to prevent theſe Inconveniences. It preſcribes a Method of Proceeding, in *two* Caſes or Manners of recovering upon the Proceeding in Ejectment which it directs; *viz.* One, in Caſe of Judgment againſt the *Caſual* Ejector: the Other in Caſe of its Coming to a *Trial*. In the *former* Caſe, of Judgment againſt the *Caſual* Ejector, (and ſo alſo upon Non-ſuit on not confeſſing Leaſe Entry and Ouſter,) it directs "That "it ſhall be *made to appear* to the Court where the Suit is "depending, *by* AFFIDAVIT, That half a Year's Rent was "due before the Declaration was ſerved; and that no ſuf-"ficient Diſtreſs was to be made upon the Premiſſes, coun-"tervailing the Arrears then due; And that the Leſſor or "Leſſors in Ejectment had Power to re-enter:" In the *latter* Caſe, (of its Coming to a Trial,) the ſame Thing muſt be *proved upon the Trial*.

The preſent Queſtion is upon a Judgment of the *former* Kind, *viz* againſt the *Caſual* Ejector, by Default; and upon an Ejectment brought UNDER *and* BY VIRTUE *of this Act*. And We muſt *take and preſume it to be a right, regular, and good* One; as nothing appears to the Contrary.

This Caſe is not at all like the cited Caſe of *Jefferies v. Dyſon*, 2 *Strange* 960. Where "in an Action for *meſne* "*Profits*, the Plaintiff offered a Recovery in Ejectment "againſt the Caſual Ejector; upon which no Writ of Poſ-"ſeſſion had iſſued: And when the Defendant would have "gone into the *Title*, the Plaintiff inſiſted that he was "*eſtopped* from doing ſo, by the Judgment againſt the *Ca-*"*ſual* Ejector." But the Ch. Juſtice held "That though "it would have been an Eſtoppel, if the then Defendant "had been made a Defendant in the Ejectment, and the "Verdict *againſt* HIM; yet that *that* Judgment to which he "was NO *Party* could be no Eſtoppel to *Him*:" And therefore the Ch. Juſt. admitted the Defendant to controvert the Title. And that Diſtinction is right, *there*: But it is not like the preſent Caſe.

I am of Opinion the Plaintiff here has no Title.

Mr. Juſt. FOSTER was of the ſame Opinion.

The Judgment is certainly good, *till* ſet aſide. The preſent Objection, "of the not producing ſuch an Affidavit," is grounded upon the Act of 4 *G.* 2. *c.* 28. And that Act *does require* ſuch an Affidavit: And *for that very Reaſon*, We muſt *preſume* "That there *was* ſuch a One *made*; and "that the Judgment was founded *upon* it." But the *Plaintiff* in that Ejectment has it not: It remains in Mr. *Cowper*'s Office.

Clearly,

* Clearly, the Plaintiff has no Title. * P. 621.

Mr. Juſt. WILMOT alſo concurred.

He ſaid it would be unreaſonable, that the now Plaintiff ſhould recover from the Landlord, after almoſt 20 Years Acquieſcence; and after the Landlord may have improved the Eſtate.

He alſo agreed to the Caſe of *Jefferies* v. *Dyſon*; But denied it to hold in *this* Caſe.

This Act was made to compel Leſſees to bring their Ejectment, or their Bill in Equity, WITHIN *a* LIMITED *Time*. And this is ſtated to be a Proceeding "*under and* "*by Virtue of* that Act." Therefore there *muſt have been* ſuch an Affidavit, though the preſent Defendant did not produce it.

Per Cur. unanimouſly,
JUDGMENT for the DEFENDANT.

Rex *verſ.* Inhabitants of Painſwick.

Wedneday, 7th June 1758.

See this CASE *abridged*, in the TABLE; and *at large*, in the Quarto-Edition of my SETTLEMENT-CASES, N°. 148. pa. 465.

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* Cottingham *verſ.* King,

* P. 623.

Paſch. 31 *G.* 2. *Rot'lo* 179.

Friday, 9th June 1758.

THIS was a Writ of Error brought upon a Judgment of the Court of King's Bench in *Ireland*; who had affirmed a Judgment in Ejectment given for the Plaintiff by the Court of Common Pleas there, after a general Verdict for the Plaintiff.

In this Ejectment, the Parcels are deſcribed to be (amongſt Others therein mentioned and included) 5000 Meſſuages, 5000 Cottages, 10,000 Acres of Land, *&c*; in all thoſe the Lordſhips, Manors, and late-diſſolved Abbey or Monaſtery

* P. 624. * naſtery of *Boyle* and *Inſemacranaw*; and QUARTER of Land of *Tallagh*, with the TOWN and TENEMENT of *Boyle*, and *Fairs* and *Markets* thereunto belonging, in the COUNTY *of Roſcommon*; And all thoſe the Lands and Hereditaments called *Grangemore*, (with many other Parcels, deſcribed by the Name of QUARTERS, ſome containing ſo many, others ſo many Acres;) and *Part of Sumternat &c*; a large *Deer-Park &c*; and the Parſonage of *Longford &c*; in the COUNTY *of Roſcommon*; and a ſmall Park or Field, in the *Poſſeſſion of &c*.

On this Ejectment, there had been (as is above mentioned) a General Verdict for the Leſſor of the Plaintiff; and Judgment for him, in *C. B.* in *Ireland*. And afterwards, A Writ of Error was brought upon it, in *B. R.* in *Ireland*: And General Errors were aſſigned. The Court of *B. R.* in *Ireland* affirmed the Judgment of the Court of *C. B.* there. And upon this Judgment of Affirmance, the preſent Writ of Error was brought.

Many Exceptions had been taken in *Ireland*, on the Part of the Plaintiff in Error, upon the Writ of Error brought in the King's Bench there. But

Mr. *Aſhhurſt*, who argued for the Plaintiff in Error here, ſaid he would *now* only take Exception to the UNCERTAINTY *of the Deſcription* of the Premiſſes ſpecified in the Declaration: Whereas in Ejectment there ought to be a *ſufficient Certainty*; that the Sheriff may know how to deliver Poſſeſſion. 1 *Brownlow* 142. *Challener* v. *Thomas:* "An "*Ejectment* will not lie, De *Aquæ Curſu*." 1 *Ld. Raym.* 277. *Shalmer* v. *Pulteney*, ſeems to concede that an Ejectment will not lie "de *quodam Ædificio*;" for the Uncertainty of the Term *Ædificium*. In *Style* 30, It was doubted whether an Ejectment lies "de uno *Croſto*." *Dyer* 84. *b.* in Aſſize "de *quadam portione* Decimarium *&c*," It was objected that the Plaint was uncertain.

This is an entire Judgment, and *entire Damages:* And it is particularly liable to Exception, in the following Inſtances; *viz.*

1ſt Exception. 1ſt. *No Vill* at all is mentioned throughout the whole Declaration: The Lands *&c* are only deſcribed to lie (generally) "in the *County* of *Roſcommon*:" This Defect runs through the whole Declaration—*Cro. Eliz.* 822. *Gray* v. *Chapman*, is in Point; and by the whole Court: "The "Declaration in Ejectment was holden ill, for not alledging "in what Vill the Tenements were." *Hob.* 89 *Rich* v. *Shere*, is moſt expreſsly in Point: And the Judgment was, for this very Cauſe, reverſed *in Cam' Scaac'*. 2 *Barnes*, 150. *Goodright, on the Demiſe of Griffin*, v. *Fawſon:* The Judgment was arreſted for the ſame Uncertainty." in which of "two Pariſhes the Meſſuage ſtood."

2d

*2d. The Words are—"With the *Town* and *Tenement*, "of *Boyle* and *Fairs* and *Markets* thereunto belonging." Now Ejectment will not lie for a *Town*; nor for a *Tenement*, generally. 1 *Sid.* 295. *Birbury* v. *Yeomans*; Ejectment "*de 7 Meſſuagiis ſive Tenementis*," was holden ill, after a general Verdict. *Cro. Eliz.* 186. *Wood* v. *Payne* was the ſame Determination, in an Ejectment "*de uno* "*Meſſuagio ſive Tenemento.*" 1 *Lord Raym.* 191. *Copleſton* v. *Piper:* The two *Powells* Juſtices ſaid, and *Treby* Ch. J. agreed, That Ejectment "*de uno Tenemento*" is ill, for the Uncertainty. 2 *Strange* 834. *Goodtitle* v. *Walton*—: After Verdict for the Plaintiff in Ejectment, Judgment was arreſted; And it was holden That an Ejectment "*de uno Tenemento*" will not lie. 1 *Barnes* 117. *Makepeace* v. *Hopwood:* Judgment in Ejectment was arreſted for the Uncertainty of the Words "One Meſſuage *or Tenement.*" * P. 625. 2d Exception.

3d. "*A Quarter*" is another Term uſed in the Declaration: Which Terms is totally *uncertain*; and even appears to conſiſt of different Numbers of Acres; ſome, more; ſome, leſs. *Yelv.* 117. St. *John* v. *Commyn*—: Ejectment "*de Caſtro villa et terris de Kilbrough in Com' &c;*" was holden inſufficient for want of expreſſing the Number and Certainty of Acres. And that Caſe is like the preſent; Which is "the Lands called *&c*;" but they are deſcribed by the Name of "One *Quarter &c*;" Which Term does not convey an Idea of any determinate Number of Acres. 3d Exception.

4th. It is of "*Part* of *S. M. & D:*" Which is abſolutely uncertain and vague. 4th Exception.

5th. And of "*a large Deer-Park in the County of Roſ-* "*common:*" Which is vaſtly too uncertain and indeterminate. 5th Exception.

6th. "Of a *ſmall Park or Field*, in the Poſſeſſion of "*&c*;" *not ſpecifying* WHERE. 11 *Co.* 55. *Edward Savel*'s Caſe: Ejectment of "a Cloſe called *Dove-Cote Cloſe*, con- "taining 3 Acres." The Judgment was arreſted, for not ſpecifying what Nature and Quality the three Acres were of. 1 *Shower* 338. *Knight* v. *Symmes:* Ejectment of "5 "Cloſes of Paſture and Meadow, called *Faldowne*, con- "taining ten Acres:" But did not diſtinguiſh how many of One, and how many of the Other. Judgment was arreſted, after a Verdict for the Plaintiff; for want of ſufficient Certainty. 1 *Salk.* 254. S. C: And *Holt* Ch. J. is there ſaid to have affirmed *Savel*'s Caſe for Law. 6th Exception.

7th. The *Quantity* and *Quality* of the Lands is not ſufficiently ſhewn. 7th Exception.

Therefore,

* P. 626. * Therefore, for theſe Exceptions, He prayed to reverſe the Judgment of the Court of King's Bench in *Ireland*.

Mr *Williams*, who argued for Sir *Edward King*, the Defendant in Error, ſaid That the Merits of the Title to this Eſtate (an Eſtate of 8000 *l. per Ann.*) came in Queſtion in *C. B* in *Ireland*; Where Lord *Kingſborough's* pretended Will was found to be a Forgery: And the Court of King's Bench there affirmed the Judgment of *C. B.* there. And being *after a Verdict* upon the *Merits*, the Court here will *preſume* what they can in *Favour* of the Judgment.

And as to the Exceptions——

1ſt. "5000 Meſſuages, 5000 Cottages *&c &c*, in the "*Lordſhips and Manors* of *&c* late belonging to the diſ-"ſolved Abbey or Monaſtery of *&c* in the County of R." is ſufficient without naming any Vill. For a *Manor* is as notorious in its Boundaries, as a Pariſh: So alſo is a Lordſhip.

The "Pariſh of *A. or B.*" has been holden ſufficient. For Proof of which, he cited a Caſe (which does not perhaps quite prove it;) *viz.* 3 *Lev.* 334. *Goodwin* v. *Blackman:* Which was an Ejectment of Lands in *K.* & *G.* Whereas the whole lay in *K.*

And *after a Verdict*, this *Manor* ſhall be *intended* to be a Vill. "*Pariſh*" ſhall be intended to be a Vill, *primâ facie*. 2 *Salkeld.* 501. *Rudd* v. *Moreton—:* It is ſaid to have been ſo adjudged in the Caſe of *Wilſon* v. *Laws*, in *M.* 6. *W.* 3.

And if a Place be named *generally*, that Place ſhall be taken to be and *intended a Vill*—This was adjudged, (as is alſo ſaid in 2 *Salk.* 501.) in the Caſe of *Vinckerſton* v. *Ebden*, *M.* 10 *W.* 3. B. R.

2dly. As to Ejectment not lying for a *Town*, or for a *Tenement*—

After a Verdict, the Court will *intend* the Lands to be *Parcel of the Townſhip:* And they ſhall paſs with it. And to ſupport this Poſition, he cited *Cro. Car.* 168. *Gennings* v. *Lake*; Where the Court conceived that the Land might be ſaid to be *appendant* to the Houſe. 3 *Keble* 44. *Smith* v. *Martyn*; Where a Garden was allowed to be demiſable, as *Parcel* of a Meſſuage. *Doe, ex dim' Saville* v. *Borlace et al'* determined in the Houſe of Lords (on a Judgment in the Exchequer) 11 *March* 1735: (Which he cited from the Reſpondent's Caſe, upon the 4th Exception,) "That the Advowſon and Common "ſhould

* "ſhould be *intended* to have been *appendant* to the Ma- * P. 627.
"nor." So here, the Lands may paſs as *appendant* or *belonging to* the Townſhip; though not alledged to be *Part* of it. So, "*Communia Paſturæ*" generally, ſhall, after Verdict, be *intended* to be *ſuch* Common, for which an Ejectment will lie, as Common *appendant* or *appurtenant*. 1 *Strange* 54. *Newman* v. *Holdmyfaſt* is expreſsly ſo determined. And an Ejectment will lie for a *Town*; and alſo for a *Tenement*, where it is reduced to a Certainty.

Moſt of Mr. *Aſhhurſt*'s Caſes are in the *disjunctive*; "Meſſuages *or* Tenements." However, here the Word "*Vocato*" renders it certain enough. 1 *Lev.* 65. Lady *Dacre*'s Caſe: *Twyſden* ſaid that though an Ejectment will not lie of a Croft; Yet it will lie of "a Croft *called* "*Black Acre*." 1 *Siderf.* 295. *Burbury* v. *Yeomans*: He repeats the ſame Aſſertion. And in both Places, he gives the Reaſon; *viz.* "That this renders it *certain*." And here, it is "the Town and Tenement *of Boyle*:" Which Appellation of it by it's Name, aſcertains it ſufficiently. And this is agreeable to what is ſaid in 3 *Mod.* 238. *Hexham* v. *Coniers*; "That the *adding* VOCAT. the "*Black Swan*, to the Words *Meſſuargium ſive Tenemen-*"*tum*, makes it certain that the Tenement intended is a "*Houſe*."

And the old Rule about the Sheriff's being neceſſarily to be informed ſo exactly *upon the* RECORD, "What he is "to deliver Poſſeſſion of," is now out of Uſe, and is not to be regarded. For the Plaintiff in Ejectment is to take Poſſeſſion, *at his Peril*, according to his *own Shewing*. *Savile* 28. *Caſe* 67. *Queen* v. *Ayleworth*: *Manwood*, Chief Baron, expreſsly declares this; and ſays "It was the "Opinion of the Chief Juſtices in the Star-Chamber." 1 *Strange* 695. *Sullivane* v. *Segrave*—An Ejectment "de "*parte* Domûs," was holden ſufficient, upon the ſame Principle. 2 *Ld. Raym.* 1470. *Bindover* v. *Sindercomb*: An Ejectment of "*Part* of a Mote, *Parcella Areæ*, *Parcella* "*Pomarij &c*," was holden good, upon Error, after Verdict. 2 *Ld. Raym.* 789. *Camell* v. *Clavering*: An Ejectment was brought in the Exchequer, "de *minutis* Deci-"mis:" And, after Verdict and Motion in Arreſt of Judgment, Judgment was given for the Plaintiff, by all the Barons. 1 *Salk.* 255. *Whittingham* v. *Andrews*: Ejectment "de *mineris* Carbonum," (generally,) without ſhewing the Number of Mines, was holden good, in *Durham*, where the Courſe was ſo, and of which the Court took Notice. And ſo the Court will take Notice of the Kingdom where *this* Ejectment was brought: And * *Eight* of the Judges there have determined this to be a ſufficient Deſcription, in *that* Country; And this Court will *give Credit to them*. 2 *Keb.* 745. † *Jane* v. *Polyxphen*: The Court conceived an Ejectment brought in *Ireland*, of

* So he ſaid: But they could not, in *Ireland*, be ſo many as Eight.

† This Caſe was adjourned.

"2 *Villis*

* P. 628. "* 2 *Villis et Terris*," to be good. *Cro. Car.* 511. *Mulcarry et al'* v. *Eyres et al'*: An Ejectment in *Ireland*, "of 100 "Acres of *Bogge*, in *Villis et Territoriis* de *D. S. & V.*" was holden good. 1 *Strange* 71. *Ld. Kildare* v. *Fisher*: An Ejectment of "100 Acres of *Mountain*," was held good in *Ireland*. And this last mentioned Case was a solemn and unanimous Judgment, after consulting the Lord Chancellor and Judges of *Ireland*.

* It is reported to be *per Curiam*; and with a *Nota bene*, too.

3dly. As to the Term "*Quarter*"—The Case cited from * *Yelv.* 117. is not the Determination of the Court: Nor was that the Point before them. And "*a Quarter*" is a known Description in *Ireland*: Every Child knows them. That Country was divided into Quarters, when Ld. *Strafford* was Ld. Lieutenant there.

As to the 4th, 5th, and 6th Objections. His Answer was, That they *All* belong to the Township: And besides, they may be the *Names* of the Closes.

7thly. And as to the last Objection—He insisted that the Quantity and Quality of the Lands are sufficiently set forth: And then answered the Cases cited on the other Side. As to *Savel*'s Case—That Case was doubted in Ld. *Raymond*'s Time; and has been since disallowed, or at least called in question. *V.* 2. *Ld. Raym.* 1472. *Bindover* v. *Sindercombe*. *Comberb.* 198, 199. *Knight* and *Symms*: *Per Eyres* Just.—The latter Opinions are against *Savel*'s Case; Though the Chief Justice indeed there says "That "an Ejectment ought to be as certain as a *Præcipe quod* "*reddat*."

Mr. *Ashhurst*, in Reply—I know Nothing of the *Merits* of this Case: I am only to argue upon the *Record*.

2d Exception. These Premisses cannot possibly be intended, to lie within the *Townships* of *Boyle*: They are only described generally, to be within the *County* of *Roscommon*. I say that an Ejectment will *not* lie of the *Town* and *Tenement itself*: Therefore, consequently, neither will it, of these Premisses *as belonging* thereto.

Possession must be delivered at the *Peril* of the *Sheriff*, *as well* as of the Plaintiff. "*De parte Domûs*" is much less uncertain, than an undefined Part *of* a *great Estate*. I agree that if the Description be *known* in *Ireland* it is enough. But I say that *this* Description is *every where* uncertain.

§ Not directly and principally, indeed; but positively and explicitly.

3d Exception. In *Yelv.* 117. The Point for which it is cited, is taken § also into Consideration, as well as the Principal Objection.

Lord MANSFIELD—This is *after a Trial and Verdict* in *C. B.* in *Ireland*: And the Objections is the *Uncertainty* of the Claim or Description of the Premisses in the Declaration.

In

* In a *Præcipe* in a real Action, which is a *formed* Writ, Preciſion is requiſite: Becauſe it was neceſſary to follow the Form preſcribed by the Regiſter. * P. 629.

Whilſt Ejectments were compared to real Actions, and Arguments were drawn from Analogy with them, they muſt be, of Courſe, *fettered:* And this was ſo, till after the Reign of King *James* the Firſt. But of *later* Times, an Ejectment has been conſidered with more Latitude; as a Fictitious Action to try Titles with more Eaſe and Diſpatch, and leſs Expence.

Even in a *Præcipe*, I do not know whether the Sheriff could always be quite certain, *Which* were the particular Acres &c, of which he was to deliver Poſſeſſion. But in this *fictitious* Action, the Plaintiff is to *ſhew* the Sheriff; and is to take Poſſeſſion *at his Peril*, of *only* what he has Title to: If he takes more than he has recovered and ſhewn Title to, the Court will, in a ſummary Way, ſet it right. So that ſuch a very exact Deſcription is not equally neceſſary in *this* Action, as in a *Præcipe*.

However, there are in this Caſe, (as it is particularly by circumſtanced,) two Things, which carry it much farther than the general Caſe of Ejectments, and are deciſive: For it is *after Verdict*; and it is *from Ireland*. The Title has been *tried* by a *Jury* of *Ireland*, where the Lands lie; Evidence has been given to them, upon which they have found for the Plaintiff; and *Two Courts there* have given Judgment for the Plaintiff, without Difficulty.

The Denominations of Land may be certain and known *there*; though unknown *here*: For Words and Names are arbitrary. Ejectments have been brought *there*, of *Mountain*, of *Bogg*; nay of Mountain *in* a Bogg: And a Certificate has been given by Judges of *Ireland*, that the Term "*Mountain*" does not neceſſarily include Situation but deſcribes *Quality*; that Fines, Recoveries, Writs of Dower, and Settlements of it, are frequent there; and Ejectments *uſually* brought of it.

And *there*, it is frequent to deſcribe the Lands of great Eſtates, even in their Settlements by "*Towns*:" I know this, of my own Knowledge.

Ireland was planted and ſettled by Degrees, both formerly and lately; And *Towns* came, by Degrees, to be known and certain Deſcriptions: And ſo, "*Quarters*" might be, after *Cromwell*'s Settlements there, and the Diviſion of it into Quarters. "*Town*" and "*Tenement*," are here uſed as ſynonymous Terms.

* P. 630. * However, the Jury of *that* Country underſtood it; and the Two Courts of *that* Country underſtood it, and have made no Difficulty about it: And therefore I am ſure I will not, *after* this, ſay "that it is not to be underſtood."

Mr. Juſt. DENISON was of the ſame Opinion "That the "Judgment ought to be affirmed:" And He held the Deſcriptions to be ſufficient.

In a *Præcipe quod reddat*, it was neceſſary to deſcribe the Lands formally, once: But it is *not* ſo, in an *Ejectment*.

I take this preſent Ejectment to contain, firſt, a general Deſcription, which takes in the Whole: And afterwards, the Eſtate demanded in it, is deſcribed particularly and in Parcels, "*what* it conſiſts of." This was ſettled in the Caſe that has been mentioned, *Doe ex dimiſſ. Savill* v. *Borlace*, *Tr.* 9 *G.* 2. *in Cam' Scacc'*;" (which I argued.) It was after a Verdict; and was an Ejectment for Tithes of various kinds: And two Things were there holden; 1ſt. That being after Verdict, it was to be *intended* as brought of *ſuch* Tithes *only*, for which an Ejectment would lie; and 2dly. that there was no Objection to a *bis petitum* in an Ejectment. And ſo here, I take it that this Manner of deſcribing the Premiſſes is a *bis petitum*, a ſecond Deſcription of the ſame Thing.

And as to the Caſes that have been urged in Support of the Objections—There has been a greater Latitude of *late* Years, than *formerly*: Whatever Strictneſs was uſed at firſt, it is certain that Ejectments are *now* conſidered upon a more *liberal* Foot. "*Town*" appears, by what has been ſaid, to be a common and known Deſcription in *Ireland*. "*Mountain*" alſo appears to be a known Deſcription *there*. And Fines, Recoveries, Writs of Dower, Ejectment and Settlements uſe it as ſuch. In the Caſe of *Ld. Kildare* v. *Fiſher*, the Caſe of *Holbourn* v. *Babbington in Dom' Proc'* is ſaid to have been reverſed upon another Point: And They gave Credit, in that Caſe of *Ld. Kildare* v. *Fiſher*, to the Certificate of the *Iriſh* Chancellor and Judges.

And '*Quarter*" may be a Term as well known in *Ireland* as "Mountain" is: And in this Caſe, I ſhall *intend* it to be ſo.

Mr. Juſt. FOSTER concurred, for the ſame Reaſons.

So alſo did Mr. Juſt. WILMOT. And He added that He never could underſtand that Manner of Reaſoning, ſo often urged upon Arguments of this Sort, *viz.* "That "the Deſcription muſt neceſſarily be *ſo certain* that the "Sheriff

* "Sheriff may be able exactly to know, without any In- * P. 631.
"formation from the Plaintiff, of *what* to give Poſſeſſion:"
Which is not true; for ſuch Preciſion is *not neceſſary* in an Ejectment.

After Verdict, this Deſcription muſt be *intended* to be ſufficient.

Per Cur. unanimouſly,

JUDGMENT AFFIRMED.

Rex *verſ.* Earl Ferrers.

Saturday, 10th June 1758.

ON *Wedneſday* 26th *January* 1757, Mr. *Norton* moved, *either* for an Attachment againſt the Earl, for not returning a *Habeas Corpus* already iſſued, and returnable *immediatè*, commanding him to bring up the Body of his Counteſs (Siſter to Sir *William Meredith*;) *or* for a new *Habeas Corpus*, ACCOMPANIED *with an Attachment*.

He ſaid that the latter had been done in the Caſe of *Rex* v. *Dr. Wright*, *M.* 5 *G.* 2. *B. R*; And that the Reaſon of iſſuing the Attachment at the ſame Time with the *Habeas Corpus*, was for Prevention of a Delay which might, in certain Caſes, render the Remedy ineffectual.*

* The Caſe was not at all, as cited. See it in 2 Strange 915.

Lord MANSFIELD aſked Mr. *Norton*, Whether He knew any Inſtance of an *Attachment* ACCOMPANYING a Writ. He ſaid He underſtood an Attachment going, for *not having* obeyed a Writ: But did not know any Inſtance of an Attachment going out *together with* the Writ.

Mr. *Norton* ſtated *Wright*'s Caſe, from a Note taken by a Gentleman who has now left the Bar; † Where *Lee*, then a Puiſne Judge, held it *might* be done: Though, in that Caſe, *Wright* did afterwards return the Writ in Court.

† The Note here relied upon was erroneous.

Note—In the preſent Caſe, Mr. Juſtice *Foſter* had granted a *Habeas Corpus*: Which was ſerved on the Earl, by Sir *William Meredith*. But Sir *William* at length agreed not to proſecute it; on *Condition* that his Lordſhip ſhould carry Lady *Ferrers* to *Bath*; which the Earl promiſed, but had not performed.

Mr. *Norton* ſaid He would take Nothing by his Motion. And

Mr. *Clayton* moved for a *new* Writ, returnable in Court *immediatè*, Which was GRANTED.

* P. 632.

* Lord *Ferrers* neglecting likewiſe to obey this *ſecond* Writ of *Habeas Corpus*, the Counſel for Sir *William Meredith* (on Behalf of his Siſter) intended, on *Tueſday* the 8th of *February* 1757, to have moved for an Attachment againſt Lord *Ferrers*, for this his Diſobedience: But ſome Doubts and Difficulties having been ſtarted by Members of both Houſes, concerning the *Privilege of* PEERAGE; and "whether the Court of King's Bench could iſſue an ATTACHMENT *againſt a Peer* during the Sitting of Parliament, "and execute it upon him, ONLY *for a* * CONTEMPT *to their* "*Court*," Sir *William Meredith* judged it prudent to petition the Houſe of Lords, for their *Leave* to proceed againſt the Earl; and accordingly, did Yeſterday, (by the Hands of the Earl of *Weſtmorland*,) deliver ſuch a Petition, ſtating the Facts. Lord *Delawarr* oppoſed it; and ſaid, It was too ſummary and haſty a Method of determining upon their Privileges; and propoſed referring the Matter to a Committee, and ſummoning Lord *Ferrers* to anſwer it in his Place: And to obviate the Objections which might be made to this Method on Account of the Delay, He offered ſome Schemes for the intermediate Safety of the Counteſs. But Lord *Mansfield* anſwered Him, and ſpoke in Support of the Juriſdiction of his Court, and the Unreaſonableneſs Injuſtice and Inconvenience of allowing ſuch a Privilege in *Criminal* Caſes and *Breaches of the Peace*. The Duke of *Argyle* then ſpoke to the like Effect, and expreſſed a Surpriſe that there ſhould be any Doubt about it; the Reaſon of the Thing being ſo clear and plain. Laſtly, the Earl of *Hardwicke* ſpoke ſtrongly and particularly in Support of the ſame Doctrine, and adduced many Inſtances and Precedents in Proof of his Poſitions; and concluded with propoſing, that to put an End to all Doubt about it for the future, the Lords ſhould come to a Reſolution; And accordingly they did come to the following Reſolution or Declaration, and Ordered it to be entered on their Journal; *viz.* "7 *Februarij* 1757. It is Ordered and Declared, "That no Peer or Lord of Parliament hath Privilege a"gainſt being compelled by Proceſs of the Courts of "*Weſtminſter-Hall*, to pay Obedience to a Writ of *Habeas* "*Corpus* directed to him."

* See *Bacon*'s New Abridgment of the Law, Vol. 3. fo. 5. Title *Habeas Corpus*, Lord *Leigh*'s Caſe, in point; and fo. 6. expreſs, "That an Attachment may be granted, if the Peer refuſes Obedience to the Writ: For, being a Contempt, a Peer has no Privilege."

(And it was afterwards, *viz.* "*Die Mercurij* 8 *Junij* "1757, Ordered and Declared by the Lords Spiritual and "Temporal in Parliament aſſembled, That no Peer or "Lord of Parliament hath Privilege of *Peerage* or of "*Parliament*, againſt being compelled by Proceſs of the "Courts in *Weſtminſter-Hall*, to pay Obedience to a Writ "of *Habeas Corpus* directed to him." And it was then and thereby further Ordered, "That this Order and De"claration be entered upon the Roll of the *Standing* "*Orders* of this Houſe.")

On

* On the 8th of *February* 1757, Mr. *Norton* renewed his Motion for an *Attachment* againſt the Earl: And he produced Affidavits of his Lordſhip's Diſobedience to the Writ, and continuing his ill Uſage of his Lady. * P. 633.

All the Affidavits (quite from the Beginning of this Affair) were read.

Lord MANSFIELD—This is a *Habeas Corpus*, at *Common Law:* which is a Prerogative Writ, for the Liberty of the Subject. The Court *may* inforce *ſpeedy* Obedience to it: And the *Circumſtances* of *this* Caſe (where Delay may be very dangerous) require it. It is reaſonable that the Lady ſhould have Opportunity of laying her Caſe before the Court; and ſwearing the Peace, if She thinks proper, in Order to obtain the Protection of the Court. The *End* of this Courſe that we now take, in iſſuing an Attachment to inforce Obedience to the Writ, is to have this Lady produced for this Purpoſe.

And therefore We think, *under the* * EXTRAORDINARY *Circumſtances* of this Caſe, *an Attachment* ſhould iſſue; *to inforce Obedience* to this Writ of *Habeas Corpus*, which ſo much affects the Preſervation and Security of this Lady.

* One of theſe was detaining Sir *William Meredith* (and who himſelf ſerved the firſt Writ upon the Earl,) and drawing a Piſtol upon him, challenging him.

But at the ſame Time, His Lordſhip intimated to them, NOT *to* EXECUTE *it* AT ALL, if it was poſſible to *obtain the End* of their Application by any *gentler* or *other Means*; the End and Intention of granting it, being only to have the Lady immediately brought up.

Mr. Juſt. DENISON (the only other Judge in Court) only ſaid "that an Attachment *ought to go.*"

ORDERED That a Writ of Attachment iſſue againſt The Right Honourable *Laurence* Earl FERRERS.

In Conſequence whereof, The Earl having been ſerved with the Writ (or at leaſt having had it notified to him) by the Under-Sheriff of *Leiceſterſhire*, accompanied by a Brother of the Counteſs;—On the *Saturday* following He appeared in *Weſtminſter-Hall*; and about one o'Clock, ſent a Meſſage into Court, to Lord *Manſfield*, "deſiring to ſpeak "with him."

Lord MANSFIELD bid the Meſſenger tell his Lordſhip, "That when an Affair was depending before the Court, He "could not ſpeak with any Body about it, *but* IN *Court.*"

Soon

* P. 634. * Soon after, the Earl came upon the Bench, and ſpoke to Lord *Mansfield*. It was not eaſy to underſtand what he ſaid, as he ſpoke pretty low: But I imagine, he propoſed putting ſome certain Queſtions to his Lady; For Lord *Mansfield*'s Anſwer was, "That when She came into Court, "All *proper* Queſtions would be aſked her."

Some Time afterwards, on the ſame Day—

Lady *Ferrers* came into Court, and had Articles of the Peace ready to exhibit againſt the Earl.

Note—Nothing more was ſaid concerning the *Habeas Corpus* or the *Return of it*; The real End of it being ſufficiently anſwered, by her being left at Liberty to come to this Court, in order to obtain its Protection.

Sir *Richard Lloyd* and Mr. *Gould*, for the Earl, deſired Leave to aſk Lady *Ferrers* one or two Queeſtions, previous to her ſwearing to the Articles which ſhe had prayed Leave to exhibit.

But Lord *Mansfield* told her Ladyſhip, That She was *not obliged* to anſwer any Queſtion previous to her ſwearing the Peace.

And He told Sir *Richard* that the preſent Buſineſs was only to obtain Security of the Peace.

Juſt at this Time, The Earl came into the Body of the Court, (upon the Floor, not upon the Bench;) and deſired to aſk Lady *Ferrers* "Whether an Affidavit which ſhe had "lately made, in the Country, before a Commiſſioner autho-"rized by this Court to take Affidavits, was made by Her "*voluntarily*, or *involuntarily*"

Note—This was an Affidavit (in which She had joined, during her being in his Power in the Country, after iſſuing of the *Habeas Corpus*;) Wherein ſhe was made to ſwear "That She was content to remain with her "Huſband; that She had no Complaint againſt him; "and that the Application made by her Relations for "the *Habeas Corpus* was without her Deſire and againſt "her Will." Which Affidavit *her Friends* ſaid was ſo far from being voluntary, that it was *extorted* from her *under Dureſſe*; and was the mere Effect of Fear Force and Compulſion, or at leaſt of very *undue Influence*.

Lord

* Lord MANSFIELD perſevered in permitting her Lady- * P. 635.
ſhip, without anſwering any Queſtions, to proceed in exhibiting her Articles; And then aſked the Earl, "if He had Security ready."

The Earl firſt, and Sir *Richard*, afterwards, preſſed that Lady *Ferrers* might anſwer their Queſtions: And Sir *Richard* dropped an Intimation that the Earl's Regard or Diſregard for her would depend upon her Anſwers.

But Lord *Mansfield* ſaid He had before told Her, that She *need not* anſwer them: And now he would *not ſuffer* Her, He ſaid, to anſwer them.

Lord *Ferrers* went in and out of Court once or twice; But did not, at *this* Time, give the Security of the Peace; Nor did Mr. *Norton* preſs that He ſhould give it immediately.

On *Wedneſday* the 27th of *April* following, the Earl appeared; and gave Security: Himſelf in 5000*l.* And each Manucaptor, in 2500*l.*

Monday, 13th *February* 1758, The Earl having broken this Recognizance in the Month of *Auguſt* 1757, by drawing a Piſtol upon Lady *Ferrers*, at the Earl of *Weſtmoreland*'s at *Merewortb Caſtle* in *Kent*; He was taken up ſome Time after, upon a freſh Warrant from Lord *Mansfield:* And having given Bail on the ſame 13th Day of *February* 1758, before my Ld. Ch. Juſtice, (whilſt his Lordſhip was gone out to Dinner,) He preſently afterwards came into Court, to appear. And upon the Return of the Ld. Ch. Juſtice—

The Counteſs alſo came into Court; and *ſwore* FRESH *Articles* of the Peace againſt the ſaid Earl, grounded upon the above-mentioned Fact. After which, He (being ſtill preſent) was called upon to give Bail to theſe recent Articles of the Peace.

He had previouſly given Notice of Two Perſons to be his Bail before the Lord Chief Juſtice: With one of which, the Proſecutors were not ſatisfied.

After ſeveral Propoſals; and after ſeveral Hints which came from Lord *Mansfield*, as well as from Mr. *Norton*, "That it was neceſſary for the Earl to give Bail *at preſent*, "and not to pray *Time* to do ſo, as the giving it *now* was "the only Method he could take, if he expected to remain at "Liberty;" It ended in a Compromiſe to take both theſe Perſons as Bail now, and to give a few Days Time for the juſtifying the doubtful One, (a Peruke-Maker,) or for finding a better.

Accordingly,

* P. 636. * Accordingly, He himſelf became bound in 5000*l.* Mrs. *Shirley* (his Mother,) in 2500*l.* and Mr. *John Bennifold*, Peruke-maker, in 2500*l.*

The Earl's Counſel *now* moved to diſcharge the former Recognizance: To which the Lady's Counſel afterwards conſented.

Tueſday, 13 June 1758.

Rex. *verſ.* Thomas Dawes.

ON *Thurſday* laſt, the 8th of *June*, Mr. *Morton* and Mr. *Burrell*, on behalf of the Commiſſioners, ſhewed Cauſe againſt making abſolute a Rule of laſt Term, made upon the Commiſſioners in and for the County of *Suſſex*, for putting in Execution the late * Act "for the ſpeedy and "effectual Recruiting His Majeſty's Land-Forces and Ma-"rines," for them to ſhew Cauſe Why *Thomas Dawes* ſhould not be diſcharged out of the Regiment of Foot commanded by Colonel *Thomas Brudenell*.

*30G.2.c.8.

They produced a Number of Affidavits; and reſted entirely upon the Facts contained in them: Which fully proved (as they alledged) that He was a proper Object of the Act of Parliament; and that the Commiſſioners had done Right; and that He ought not therefore to be diſcharged from the Condition of a Soldier.

Mr. *Harvey* and Mr. *Norton*, on Behalf of the Defendant *Dawes* (the impreſſed Man,) on the contrary, argued for making the Rule abſolute, "for diſcharging him."

They urged That this was a high and unconſtitutional Authority lodged in theſe Commiſſioners, and without requiring from them any Oath of Duty: And they endeavoured to ſhew, from their Affidavits, that the Man was not a proper Object of the Commiſſioners Juriſdiction. They argued therefore, that He ought to be diſcharged; Eſpecially, as the Crown did not at all interpoſe.

Note—The Regiment was gone abroad: But the Man himſelf had firſt *deſerted* from it.

The Court did not come to any Determination, then; but took Time, in Order to conſider the Affidavits on both Sides.

Now,

* Now, Lord MANSFIELD delivered the Opinion of the Court; in which, He ſaid, they were all agreed: And All of them, He ſaid, had ſeparately read over the Affidavits. * P. 637.

Then he went minutely through the Affidavits on both Sides; and made the proper Remarks upon the different Repreſentations of the Caſe.

The Reſult was, That they clearly thought him *to be* a proper Object; and that the Commiſſioners had done Right.

Whereupon, they DISCHARGED THE RULE.
[See the Caſe next following this.]

Rex *verſ.* Andrew Keſſel.

THIS Point was exactly ſimilar to the laſt; being the Caſe of a preſſed Man, who applied to be diſcharged out of Captain *Temple*'s Company in Colonel *Duroure*'s Regiment, upon the Foot of Injuſtice done to him by the Commiſſioners, to whom He was obliged by Force to ſubmit: And the Queſtion turned, in like Manner, upon the Man's being a *proper Object* of the *Commiſſioners Juriſdiction*, or not; which depended upon the particular Circumſtances of the Caſe, ſworn to, on both ſides.

It was argued on the 10th of *June*, by Mr. *Norton* and Mr. *Biſhop* for *Keſſel*, and by Mr. *Huſſey* for the Commiſſioners, upon the *Fact* only.

No Objection was made, on Behalf of his Majeſty, or of Colonel *Duroure*.

The Court had taken Time, (as in the former Caſe,) to look into the Affidavits. And now

Lord MANSFIELD declared the Opinion of Himſelf and his Brethren, "That upon the Circumſtances appearing in "*this* Caſe, The Man was *not* a proper Object of the Com-"miſſioners Juriſdiction; and that He was, by an undue "Exerciſe of the Power truſted to them, compelled to ſerve "as a Soldier."

And therefore They ordered That he ſhould be forthwith diſcharged. (But they would not give *Coſts*; though aſked for, by the Man's Counſel.)

Note—

* P. 638. * Note—In both theſe Caſes (of *Dawes* and *Keſſel*,) Neither of them could have brought a *Habeas Corpus:* Neither of them was in Cuſtody. *Dawes* had deſerted, and abſconded: *Keſſell* was made a Corporal. Both prayed to be diſcharged from the Condition of Soldiers, upon the Ground of the Commiſſioners having miſbehaved in the Exerciſe of a Parliamentary Authority; (for which Miſbehaviour, they might be liable to an Information.) In neither Caſe, did the Counſel object to the Propriety of this Method: And the Benefit to the Subject is manifeſt.

Rex *verſ.* Davis.

V. Rex v. *Roger Johnſon*, 2 *Strange* 824. S. P.

THE Defendant having been apprehended upon an Outlawry for High-Treaſon in diminiſhing the Coin of this Kingdom (*viz.* filing Guineas,) was brought up by *Habeas Corpus* from the Place where He was taken; and afterwards committed to *Newgate:* From whence he was brought up by Rule, on *Tueſday* 6th *June* 1758.

Mr. *Norton*, for the Crown, immediately prayed that he might be aſked "what he had to ſay why Judgment ſhould "not paſs upon him."

And the Outlawry was then ordered to be read; And was accordingly begun to be read. But

The COURT not having had any previous Notice of this, nor having even ſeen the Outlawry, Adjourned it to the *Saturday* then next following (the 10th;) and Ordered that Copies of the Outlawry ſhould be ſent to them, in the mean Time.

The Defendant intimated "that he was out of the Realm "at the Time of the Outlawry pronounced:" And he alſo intimated his Deſire to have the Aſſiſtance of Counſel.

But *per* Lord MANSFIELD—The Court can *not aſſign* him Counſel, *till* he has pleaded: And *then* he may have Counſel, upon that *collateral* Matter. However, the Court do not reſtrain Counſel from adviſing him in *private.*

N. B. The Sheriff of *Middleſex* was ready with a Jury, *in Caſe* he had now pleaded "That he was NOT *the* "*ſame Perſon.*"

On

* On the ſaid *Saturday* 10th *June*) the Defendant being brought to the Bar, was called upon to hold up his Hand; and then arraigned (by Mr. *Athorpe* Secondary of the Crown-Office,) upon an Outlawry upon an Indictment in *London*, for High Treaſon in diminiſhing the Coin of this Kingdom; and aſked what he had to ſay for himſelf "Why this Court "ſhould not proceed to give Judgment and award Execu-"tion againſt him according to Law." * P. 639.

Note—The Sheriff of *Middleſex* was again ready with a Jury, (as before) in caſe he had denied his being the identical Perſon.

Mr. *Whitaker*, who was Counſel for the Priſoner, prayed that the Outlawry might be read, Which being done—

Mr. *Whitaker* ſaid, that If the Outlawry is bad, the Defendant, or even any *Amicus Curiæ*, may, aſſign Errors upon it; And the Court will either give him Time to apply for a Writ of Error, or give him Leave to plead to the Indictment.

Now this *Outlawry is bad*, (He ſaid) upon the Face of it.

1ſt Exception—The ſecond *Capias* ought to have had 3 *or* 4 MONTHS between the Teſte and Return: Whereas this has *only* 15 *Days*. 8 *H.* 6. *c.* 10. is expreſs "that it ſhall be "returnable 3 Months after, where the Counties are hol-"den from Month to Month; and 4 Months after, where "the Counties are holden from 6 Weeks to 6 Weeks." 10 *H.* 6. *c.* 6. confirms the former Act; and extends it to Indictments removed by *Certiorari*. And for Want of this, the Outlawry is *void*.

2d Exception. Here is a *Diſcontinuance* of Proceſs for a whole Year: There being a Chaſm of a whole Year, in which it does not appear that any Writs were *iſſued out* (though the Sheriff's Returns to ſuch Writs are indeed ſet out.)

3d Exception (To the *Exigent*.) This Exigent is in *London:* And the Outlawry is returned to be pronounced BY *Mr. King*, the *Coroner*. Whereas the *Lord Mayor* of *London* is *perpetual Coroner* in *London:* And the *Recorder* is to *pronounce* it. *Cro Jac.* 531. *Garrard* v. *Regem*, proves that the Mayor for the Time being is perpetual Coroner. 2 *Ro. Abr.* Title *Utlagarie*, *Fo.* 805, 806. prove both Poſitions: *Pa.* 806. "That the Mayor is Coroner; and *pa.* 805. *per quel*, *Pl.* 1. "That the Judgment is given by the Recorder; "and *not* by the Coroners."

4th Ex-

* P. 640. * 4th Exception. He is not ſaid to be outlawed, "*ſecundum Legem et Conſuetudinem Regni:*" Which the Writ requires. And *Dalton* gives the Return in that Manner.

5th Exception. The *Name of Office* of the Sheriffs is not ſet to the Return of the ſecond Exigent: 'Tis only "the "Return of *W. A.* and *A. C. Eſquires.* 2 *Hale's Hiſt. P. C.* "204. is expreſs that it muſt be ſo: "The Sheriff's Name "*and Office* alſo muſt be ſubſcribed to the Return of the "Exigent: e. g. *A. B. Arm' Vicecomes.*"

N. B. The Record appeared to be right. But Mr. *Whitaker* ſaid it was not ſo in the Return upon the Writ itſelf.

6th Exception was to the *Writ of Proclamation.* Which he alledged to be faulty, both in its *Teſte* and in its *Return.* This Writ is founded upon the Statute of 31 *Eliz. c.* 3. Which gives it in Perſonal Actions, and directs the particular Manner &c; And to be of the SAME Teſte and Return with the Exigent. 4, 5 *W. M. c.* 22. §. 4. extends this Writ of Proclamation to *Criminal* Caſes, as well as Civil; and directs it to be delivered to the Sheriff, 3 Months before the Return.

Now this Writ of Proclamation is *teſted* and *returned* upon the SAME DAY. And the return of the Sheriff is only "That he cauſed him to be proclaimed according to the "Form of *the* Statute." But *Non conſtat What* Statute he means: There is none mentioned in the Writ.

The Return ought to be particular; and to *ſpecify* the reſpective Proclamations, and to ſhew that they were a Month before the *quinto exactus* by Virtue of the Exigent. And ſo *Dalton* ſays.

7th Exception. The Man was *abroad, out of the Kingdom,* at the Time when the Outlawry was pronounced againſt Him.

This, indeed, is an Error in *Fact*; and muſt be verified.

8th Exception. The Huſtings (where it was pronounced) are *not* ſaid to be "holden *in and for* the City of *London.*"

Mr. *Norton contra, pro Rege,* ſaid He would be under the Direction of the Court, whether to defend it now, or take Time.

The COURT ſeemed to think that Mr. *Attorney General* ſhould have been preſent.

But

* But Mr. *Norton* ſaid that Mr. *Attorney* had deſired to be excuſed. * P. 641.

Lord Mansfield—*Some* of the Exceptions ſeem to have Weight: And ſome of the Errors alledged are Errors in Fact; And it is a Matter of Diſcretion in the *Attorney General*, "Whether he will think proper to confeſs *them*, "or not."

Mr. Juſt. Foster—Some of the Exceptions go to ſhew the Outlawry to be a *Nullity*, and to avoid it *without* a Writ of Error.

Which Lord Mansfield agreed to.

Mr. Juſt. Denison—The Cuſtom of the City of *London* is a Matter of Fact.

Lord Mansfield—Mr. *Attorney General* will conſider Whether to confeſs the Errors in Fact, and let the Party in, to plead to the Indictment; or take the longer Courſe of a Writ of Error: This is a Matter of Prudence.

Mr. *Whitaker* prayed that the Priſoner might be ſent to the Priſon of *this* Court; and not to *Newgate*.

Per Cur'. *Newgate* is as much the *Priſon of this Court*, as the King's Bench Priſon is: Every *Priſon in the Kingdom* is the *Priſon of this Court*.

The Priſoner was remanded; and Ordered to be brought up again on *Tueſday*, the 13th.

And Now, the Defendant being brought up accordingly, Mr. *Attorney General* allowed that One or Two of the Exceptions were fatal; As for Inſtance the 1ſt and the 6th.

But though the Act of 31 *Eliz. c.* 3. declares the Outlawry to be *void*, if had otherwiſe than that Act directs: Yet he ſaid, He was afraid this Making it void could not be done by the Court upon *Motion*; but it muſt be avoided by *Writ of Error*, in the *legal* Way. For ſo is *Plowd. Com.* 137. *b.* and *Hob.* 166. and 2 *Hawk. P. C.* 306. *c.* 27. § 127.

Lord Mansfield—What do you ſay to the Errors in *Fact?*

Mr. *Attorney General*—If there are any that I *can* confeſs, I would do it: Becauſe I am ſatisfied it *muſt be reverſed* upon a Writ of Error. As to the 7th. If I was to confeſs it, it would not ſignify; Becauſe his Time is elapſed: The Year is expired.

Cur'.

* P. 642. * *Cur'*. There is no getting at it, without a Writ of Error.

Lord MANSFIELD—If the Attorney General has an Authority from the Crown, he may confeſs an Error in *Fact*, which is not true: But the *Court* will not permit the Confeſſing an Error in *Law*, which is not true.

Mr. Juſt. FOSTER mentioned a Caſe of one Mr. *Stafford*, who was called "Eſquire;" And he ſaid he was only a Yeoman, and not an Eſquire: And the Attorney General came in and confeſſed it. *

* *V. Lucas's Reports* 188.

The preſent Defendant was remanded in *Order to* † *purchaſe his Writ of Error.*

† "*Purchaſing*" his Writ of Error is a technical Term; which does *not* here convey any *pecuniary* Idea, as if he was to pay a *Price* for it.

N. B. Per Cur' and Counſel—There are a great many *other Errors* upon this Record.

Wedneſday, 14th June 1758.

Cheſterton *verſus* Middlehurſt.

A *Bail-Bond* was given in a Court of a *County Palatine (Cheſter)*, in an Action brought there: Which Bail-Bond being aſſigned by the Sheriff, an Action was brought upon it in *this* Court.

The Defendant filed Special Bail, below; and then moved to ſtay Proceedings here. And

The COURT All held this bringing the Action here, to be an *unfair Practice:* unleſs there had been ſome *Special Circumſtance* to warrant it, (as the Defendant's Living out of the Juriſdiction, or the like:) Which was not even pretended, in the preſent Caſe. Therefore the Court held that the Plaintiff ought to have proceeded in the * *Court* below; and accordingly *ſet aſide* his Proceedings in *this* Court.

*V *Walton*, Aſſignee, v. *Bent. Tr.* 1766. 6 *G.* 3. B. R. "An Action "upon a "Bail-Bond "muſt be "brought "in the "SAME "*Court* "where the "Bail was "given."

Rex *verſ.* Florence Henſey M. D.

ON *Monday* 8th of *May* 1758, The Defendant was brought into Court by the Keeper of *Newgate*, upon a *Habeas Corpus* directed to him, commanding Him "to "bring up his Body." He appeared (upon the Reading of the

* the Return) to have been committed by Warrant under the Hand and Seal of the Earl of *Holderneſs* One of his Majeſty's Principal Secretaries of State, for *High Treaſon* in ADHERING to, and aiding and correſponding with the King's Enemies; and to be detained in his Cuſtody, by Virtue of a ſecond Warrant of the like Kind. * P. 643.

Mr. *Attorney General* prayed that the Return might be filed.

Cur. Let it be filed.

Mr. *Attorney General* then informed the Court and the Defendant, "That there was an Indictment of High-"Treaſon found againſt the Defendant:" (Which Indictment was ſo found by the Grand Jury, by itſelf ſingly, and brought into Court, ſingly, by them on *Tueſday* laſt.) With which Indictment, the Defendant being now charged, And being called upon by the Secondary of the Crown-Office to hold up his Hand, The Court Ordered the Indictment to be read to him.

But The COURT, (*before* it was read to him,) aſked him "Whether he deſired Counſel to be aſſigned to him;" And if he did deſire to have Counſel, then "*Whom*, "by Name, He deſired to have aſſigned to him."

He named, And accordingly

The COURT aſſigned to him, Mr. *John* * *Morton*, and the Honourable Mr. *Thomas Howard*; and Mr. *John Peirce* for his Attorney.

* *N.B.* Mr. *M.* is not One of His Majeſty's Counſel; (though He has a Patent of *Precedency*.)

The Indictment was then READ *verbatim* to him, by the *expreſs* Direction of the Court: (Although He *had a* COPY of it five Days ago; agreeable to 7 *W.* 3. *c.* 3. "for regu-"lating of Trials in Caſes of Treaſon and Miſpriſion of "Treaſon.") Upon which Indictment being thus read to him by Mr. *Barlow*, He was immediately aſked (by Mr. *Athorpe*, Secondary of the Crown-Office,) "Whether he "was guilty or not guilty of the High-Treaſon therein "charged upon him." To which he pleaded

NOT GUILTY.

The Defendant, after he had pleaded, "Not guilty," intimated to the Court "That he had received hard and ſe-"vere Uſage, during his Confinement."

Mr. *Attorney General* abſolutely diſavowed his having received any ſevere Treatment at all; and aſſured him that he would be treated with all poſſible Humanity, ſo far as was conſiſtent with his being ſafely ſecured from Eſcaping.

Then

* P. 644. * Then a Day was fixed for his Trial; *viz. Monday* 12th *June* 1758.

Which being ſettled, without any ſort of Objection on any Part, the Defendant was

REMANDED (to *Newgate.*)

On which *Monday* 12th *June* 1758, at the Trial, The Defendant's Council took Exception to the Reading of two Papers—(No. 1, 2) being the rough Draughts of Letters written by himſelf, and found in a Bureau where he kept his Linen and Papers; and which were only *introductory* Evidence; not any Part of the *Overt-Acts*, which were to ſupport the Species of the Treaſon charged upon him. It was objected to them, that they were not ſufficiently proved to be *found in his Cuſtody*; nor ſufficiently proved to be his *Hand-Writing*: For *mere Compariſon of Hands* is not ſufficient to ſupport their being read againſt the Defendant.

The Counſel for the Crown anſwered, That the Papers being *found in his Cuſtody*, and his Hand having been *ſufficiently proved by Perſons who had ſeen him write*, it was ſufficient to intitle the Crown *to read* them; though the Jury are to judge of them. And they mentioned *Layer*'s Caſe; and Lord *Preſton*'s Caſe; and *Francia*'s Caſe; and *Sidney*'s Caſe; and *Buchanan*'s Caſe in the North, in 1746; and *Croſby*'s Caſe, *Skinner* 578, 579. and 1 *Ld. Raym.* 39. S. C. *Rex* v. *Croſby alias Philips:* Where Compariſon of Hands was allowed to be good Evidence, if the Papers are found in the Cuſtody of the Perſon himſelf. Sir *John Wedderburn*'s Caſe. Sir *Cholmeley Dering*'s Caſe—for Murder; *(i. e. Rex* v. *Thornhill.)*

The COURT unanimouſly over-ruled the Objection. Theſe Papers *were found in his Cuſtody*; and they have been ſufficiently proved by Perſons who have *ſeen him write*, to intitle the Crown to *read* them.

Then the Evidence for the Crown being opened, and given; (which conſiſted chiefly of Letters to and from the Priſoner;) and being alledged to be a Proof of Overt-Acts of *two* different Sorts of Treaſon, *viz. Of compaſſing and imagining* the Death of the King, and alſo of *adhering* to the King's Enemies;

Mr. Solicitor General declined Summing up the Evidence; chooſing to reſerve himſelf for the Reply.

Which the COURT held to be within Rule, if He ſo thought proper.

So

* So the Counſel for the Crown reſted it here. * P. 645.

Then the Counſel for the Priſoner (Mr. *Morton* and Mr. *Howard*) began upon his Defence. They declined giving any *Evidence* on the Part of their Client: But they inſiſted upon theſe two Topics, in his Defence; *viz.*

1ſt. That *no* One act was proved upon him in *Middleſex*; where the Indictment is laid.

2dly. That the Evidence, if it had been brought Home to the Defendant ſo as to affect him, yet would by no means have *amounted to a Proof* of any Overt-Acts of *either* of the two before named Species of Treaſon.

For they were only Letters of *Correſpondence*. And if a Correſpondence of this Nature, either within or out of the Realm, had been Treaſon in *general* and in *all* the King's Subjects, within 25 *Edw.* 3. it would never have been *particularly enacted to be Capital* in a SOLDIER, by the Mutiny Acts of 3, 4 *Ann. c.* 16. § 35. Fo. 266. and 30 *G.* 2. *c.* 6. §. 1.

N. B. The former makes it Treaſon, to do it either "upon "Land, *out of England*, or at Sea:" The latter makes it Capital, or ſuch other Puniſhment as a Court Martial ſhall inflict, to do it "upon Land *within* OR *out* of "*Great Britain*, or upon the Sea."

Mr. YORKE, His Majeſty's Solicitor General, then proceeded to reply: In doing which, He made only ſome General Obſervations upon the Evidence that had been given on the Part of the Crown, but did not ſum it up particularly, (as the *Priſoner* had given *no Evidence* at all;) but confined himſelf to what the Defendant's Counſel had urged in his Favour, in Point of *Law and Reaſon*.

He anſwered thus, to the Objections which they had inſiſted upon.

1ſt. That the 5th Letter given in Evidence bears Date "from *Twickenham*," which *is in Middleſex*. Which alone, is a full Anſwer to the Objection.

2dly. That the Correſpondence proved *was*, in Point of Law, an *Evidence of an Overt-Act*, of EACH of the before mentioned Species of Treaſon.

* P. 646. * First—Of *Compaſſing and imagining* the Death of the King. To prove which, he cited 1 *H. H. P. C.* 167. Cardinal *Pool*'s Caſe 3 *Inſt.* 14. S. C. And ſo Ld. Ch. J. *Holt* alſo held, *Gregg*'s Caſe; (which He cited from a Manuſcript Report of Judge *Tracy*'s:) And Baron *Smyth* and Mr. Juſt. *Dormer* ſeemed to agree to it. And in Ld. *Preſton*'s Caſe, alſo, Ld. Ch. J. *Holt* ſo held.

Secondly—It is alſo an Overt-Act of *adhering* to the King's Enemies. In *Gregg*'s Caſe—, It was agreed by all the Judges, "That ſuch Letters, *though intercepted* before they "arrived, were ſo."

Lord MANSFIELD—We have ſeen three Reports of *Gregg*'s Caſe; *viz.* One by Ld. Ch. Baron *Dodd*; another by Mr. Juſt. *Price*; and this, by Mr. Juſt. *Tracy*: And they all three agree "That ſuch Letters, *though intercepted*, were Overt-Acts of *each* Species of Treaſon "before mentioned; And that *All* the Judges *agreed* in "this."

Mr. Solicitor General—And as to the Statutes of Queen *Ann* and the preſent King, The Statutes of 7 *Ann. c.* 4. and the late Mutiny Act of 30 *G.* 2. *c.* 6. go *further* than the Act of 25 *Ed.* 3. does.

Lord MANSFIELD ſummed up the Evidence.

As to the LAW—*Levying War* is an *Overt-Act* of *Compaſſing* the Death of the King: An *Overt Act* of the *Intention* of levying War, or of bringing War upon the Kingdom, is ſettled to be an *Overt Act of Compaſſing* the King's Death *Soliciting a foreign Prince, even in Amity* with this Crown, to invade the Realm, *is* ſuch an *Overt*-Act: And ſo was Cardinal *Pool*'s Caſe. And *One* of theſe Letters is ſuch a Solicitation of a foreign Prince to invade the Realm.

Letters of Advice and Correſpondence, and Intelligence to the Enemy, to enable them to annoy us or defend themſelves, written and ſent, in order *to be delivered* to the Enemy, are, *though intercepted*, Overt-Acts of *both* theſe Species of Treaſon that have been mentioned. And this was determined by all the Judges of *England*, in *Gregg*'s Caſe: Where the Indictment (which I have ſeen) is much like the preſent Indictment. The only Doubt, there, aroſe from the Letters of Intelligence being *intercepted* and *never delivered*: But They held "that *that* Circumſtance did *not* alter the "Caſe."

As

* As to the FACT, in the preſent Caſe—The Jury are to conſider whether they were written by the Priſoner at the Bar, *in Order to be delivered to the Enemy*, and *with Intent* to convey to the Enemy ſuch Intelligence as might ſerve and aſſiſt them in carrying on War againſt this Crown, or in avoiding the Deſtinations of our Enterprizes and Armaments againſt them. * P. 647.

Then His Lordſhip went through the Evidence particularly: And having finiſhed his Summing it up, He propoſed to the Counſel, and they agreed to it on both Sides, "That "the Jury ſhould take the Letters out with them."

As to the *Locality* of the Facts—He ſaid, It is certain that *ſome One* Overt-Act muſt be proved IN *the County* where the Indictment is laid: Indeed if *any One* be ſo proved in *that* County, it will let in the Proof of others in *other* Counties.

Now here, *One* of the Letters is *dated at Twickenham*, which is in *Middleſex*.

The Jury went out, a little after eight, taking the Letters &c with them; And; ſoon ſent to deſire Leave to have Candles; which the Officer who brought in their Meſſage ſaid he was ſworn "not to let them have;" unleſs it ſhould be ſo *Ordered*.

Lord MANSFIELD aſked the Counſel, if either Side objected to it.

And the Counſel on both Sides agreeing to it—

Leave was given accordingly: And they had them.

In half an Hour, the Jury returned, and brought in their Verdict, "GUILTY."

Lord MANSFIELD obſerved, as to the two Acts of Parliament of 7 *Ann. c.* 4. and 30 *G.* 2. *c.* 6.—That they carried the Matter *further* than the Law extended to before; And, beſides that, they were Both of them *declaratory*, as well as enacting; which was calculated on purpoſe to avoid the very Objection that has been now taken: (*V. ante*, 645.)

The Defendant was remanded to *Newgate*; and a Rule made "to bring him up again on *Wedneſday*."

P. 646. * First—Of *Compassing and imagining* the Death of the King. To prove which, he cited 1 *H. H. P. C.* 167. Cardinal *Pool*'s Case 3 *Inst.* 14. S. C. And so Ld. Ch. J. *Holt* also held, *Gregg*'s Case; (which He cited from a Manuscript Report of Judge *Tracy*'s:) And Baron *Smyth* and Mr. Just. *Dormer* seemed to agree to it. And in Ld. *Preston*'s Case, also, Ld. Ch. J. *Holt* so held.

Secondly—It is also an Overt-Act of *adhering* to the King's Enemies. In *Gregg*'s Case—, It was agreed by all the Judges, "That such Letters, *though intercepted* before they "arrived, were so."

Lord MANSFIELD—We have seen three Reports of *Gregg*'s Case; *viz.* One by Ld. Ch. Baron *Dodd*; another by Mr. Just. *Price*; and this, by Mr. Just. *Tracy*: And they all three agree "That such Letters, *though intercepted*, were Overt-Acts of *each* Species of Treason "before mentioned; And that *All* the Judges *agreed* in "this."

Mr. Solicitor General—And as to the Statutes of Queen *Ann* and the present King, The Statutes of 7 *Ann. c.* 4. and the late Mutiny Act of 30 *G.* 2. *c.* 6. go *further* than the Act of 25 *Ed.* 3. does.

Lord MANSFIELD summed up the Evidence.

As to the LAW—*Levying War* is an *Overt-Act* of *Compassing* the Death of the King: An *Overt Act* of the *Intention* of levying War, or of bringing War upon the Kingdom, is settled to be an *Overt Act of Compassing* the King's Death. *Soliciting a foreign Prince, even in Amity* with this Crown, to invade the Realm, *is* such an *Overt*-Act: And so was Cardinal *Pool*'s Case. And *One* of these Letters is such a Solicitation of a foreign Prince to invade the Realm.

Letters of Advice and Correspondence, and Intelligence to the Enemy, to enable them to annoy us or defend themselves, written and sent, in order *to be delivered* to the Enemy, are, *though intercepted*, Overt-Acts of *both* these Species of Treason that have been mentioned. And this was determined by all the Judges of *England*, in *Gregg*'s Case: Where the Indictment (which I have seen) is much like the present Indictment. The only Doubt, there, arose from the Letters of Intelligence being *intercepted* and *never delivered*: But They held "that *that* Circumstance did *not* alter the "Case."

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The Defendant was remanded to *Newgate*; and a Rule made "to bring him up again on *Wedneſday*,"

* P. 648. * And the Priſoner being accordingly brought to the Bar, on this Day about 4 o'Clock in the Afternoon, by the Keeper of *Newgate*,—

Mr. Attorney General prayed the Judgment of the Court upon him.

Mr. *Atherpe*, Secondary of the Crown Office, called upon Him to hold up his Hand; and reminded him, "That he "had been indicted of High Treaſon, and thereto had "pleaded *Not guilty*; and for his Trial had put himſelf "upon God and the Country, which Country had found him "Guilty;" and then aſked him "If he had any Thing to "ſay for himſelf, why the Court ſhould not proceed to give "Judgment againſt him according to Law."

The Priſoner thereupon took out a written Paper; and rather read, than ſpoke it. It conſiſted partly of an *Apology*, and partly of a Sort of *Defence* againſt the Charge; together with ſome Objections to the *Proof* of it upon him.

The Subſtance of it was—That the Correſpondence with which He had been charged, as treaſonable and giving Intelligence to an *Enemy* of his Liege Sovereign, was nothing more than writing Letters to his *own Brother*, who was ſo far from being an Enemy, that he as in the Service of the King's *good Brother and faithful Ally*, as His Majeſty Himſelf had ſtiled the King of *Spain*, in His Speech to his Parliament; and that theſe Letters contained *only Coffee-Houſe News and idle Speculations*; but gave no ſuch Intelligence as could be *uſeful* or even unknown to an Enemy; nor did betray any of the *Secrets* of this Government to their Enemies.

That he had no Malignity in his Heart, againſt the King or His Government; nor had ever been guilty of any improper Behaviour; But always conducted himſelf with Decency and Duty towards his King and Country: For the Truth of which, he appealed to his Character and Converſation.

And as to the *Papers* which were ſeiſed by the Meſſenger, at the Houſe where he lodged—They might juſt as well be the *Woman*'s of the Houſe, as *his*: For Both of them had *Acceſs* to the Bureau, in which the Meſſenger found them.

That the Statute of 7 *W.* 3. *c.* 3. § 2 & 4. directs that there ſhall be *two* Witneſſes to each Overt-Act of the ſame Treaſon. Whereas his *Hand-writing had been proved only by Ont* Witneſs, who could pretend to *know* any Thing of his Hand-writing:

* writing: For that the other *three* knew little or nothing of his Hand, and could *ſcarcely* be ſaid even to have ever ſeen him write. * P. 649.

[Note. The Act directs "That *either* both the Witneſſes "muſt be to the ſame Overt-Acts, OR One of them to "One, and the Other of them to another Overt-Act of "the ſame Treaſon."]

And there was no Witneſs at all, he ſaid, to prove any Act of Treaſon committed by him *in the County* of *Middleſex*, where the Indictment lays the Offence to have been done.

He alledged, that this Caſe of his was the *firſt Inſtance* ſince the Statute of *Edw.* 3. where *Giving Intelligence* has been holden to be *High-Treaſon*. And he ſaid, that as he had not had four Days between his Trial and his Sentence, (as was uſual,) his Counſel had not had ſufficient Time to prepare themſelves in Arreſt of Judgment.

Therefore upon the whole, he prayed that the Court would either be ſo kind to him as to *reſpite* his Sentence; or, if that might not be obtained, that they would be graciouſly pleaſed to recommend him to *His Majeſty's Mercy*.

He was then aſked "if he had any *Point of Law* to move in *Arreſt* of Judgment."

To which his Anſwer was, "That he had not."

Lord MANSFIELD then obſerved, that the Priſoner had been convicted upon a very full Trial, and upon very cogent Proof; and that he appeared upon the Evidence to have committed *many* Overt-Acts of Treaſon.

He took Notice, that the Priſoner had even *ſolicited* this Employment, *from Inclination*; as well as undertaken for *Hire*, to act as a Spy againſt his own native Country, and to reveal the Secrets of the King and Government to the open Enemies of Both; and to give them Information and Intelligence of the Enterpriſes and Deſigns of this Kingdom againſt them; and all this, with Intent and in Order to aid and aſſiſt them in defending themſelves againſt his King and Country.

He obſerved that the Enemy had manifeſtly ſhewn "that "*they themſelves looked upon* this Correſpondence to *be* an "Aid and Aſſiſtance to them;" by their giving him a Stipend, and paying him a ſtipulated Monthly Price, as the Purchaſe and Reward of it, under a Penalty of his forfeiting 20*s.* for every Omiſſion of a Weekly Letter from him.

He

* P. 650. * He alſo obſerved, that the Priſoner appeared to have procured his Information of the State of our Navy and Army and Finances, and the other Matters contained in his Papers and Memorandums ſeized in his Bureau, with that very VIEW *and Intention* of communicating them to the Enemy: And by his Letter of the 22d of *July* laſt, he had even *adviſed and invited the Enemy* TO INVADE *his Native Country*; and to *bring War and Deſtruction into the Heart of it.* The Guilt of this Offence ariſes from the *Nature* of the Correſpondence, which is calculated to betray the *Secrets* of his King and Country to the Enemy, *as a* SPY; a Treaſon of a very dangerous Kind, and which gives an Enemy much more Aid and Aſſiſtance, than a Perſon publicly and profeſſedly declaring himſelf an *open* Enemy to his own Country could give them.

He laid it down as a Point which was never doubted, "That this Offence, of SENDING INTELLIGENCE to the "Enemy, of the Deſtinations and Deſigns of this Kingdom "and Government, *in Order to* aſſiſt them in their Opera- "tions againſt Us or in their Defence of themſelves, is "High-Treaſon; *even* ALTHOUGH ſuch a Correſpondence "ſhould be *intercepted*, without ever coming to the Enemy's "Hands. And ſo was the Reſolution of All the Judges, "in *Gregg*'s Caſe."

And as to the Witneſſes to the Priſoner's *Hand-Writing*—There are *Four* of them that have *ſeen* him write, and ſwear to his Hand, of their *own Knowledge*: And theſe four Witneſſes are *not contradicted* by any Evidence on his Part; but, on the contrary, are *confirmed* by a Variety of Circumſtances.

As to the Point of *Locality*—He ſaid that IF there had been *no* Evidence at all, of that particular Letter which bears Date at *Twickenham* (which is *in Middleſex,*) Yet nevertheleſs the *Preſumption* was ſtrong and ſtood uncontradicted too, "That they were *written in Middleſex*, where the Priſoner "reſided, and where his Papers were ſeized."

As to *Mercy*—He told the Priſoner, that *that* was in the KING's Breaſt; but was no Part of *their* Province: And therefore his Application on *that* Head, muſt be *elſewhere.*

The *Lord* CHIEF *Juſtice* (it being a Caſe of *High-Treaſon*) pronounced the Sentence.

Mr. *Attorney General* then moved, that the Court would appoint a *Day* for the *Execution.*

Lord MANSFIELD ordered him to name a Day.

Mr.

* Mr. *Peirce*, the Defendant's Solicitor, ſaid he hoped it would not be an early Day. * P. 651.

Mr. *Attorney-General* ſaid, He was willing to give as long a Day as might be proper.

Mr. Juſtice FOSTER mentioned, that Dr. *Cameron* had 3 Weeks.

[*N. B.* Mr. *Charles Radcliffe* had only a Fortnight.]

Mr. *Peirce* deſired that this might be a *Month*.

The COURT and Mr. *Attorney General* very readily agreed to a *Month*. Accordingly, it was Ordered to be upon *Wedneſday* the 12th of *July*.

The Priſoner was remanded to *Newgate*; and bowed reſpectfully to the Court, and courteouſly to the Bar and Audience, on retiring.—

Note.

On the *laſt* Day of a Term §
An *Attachment* may be moved for, in the two Caſes following, *viz.*
For * Non-payment of *Coſts*; and
Againſt a Sheriff, for *not returning* a Writ.

§ V. poſt. 28th November 1769, Jacob's Caſe.

* This former Caſe was confirmed by the Court, expreſsly and particularly, on a Motion of Mr. *Widmore*'s the laſt Day of *Michaelmas* Term, 1770.

This was alledged by Mr. *Clayton*, and conceded by the Court, to be the Practice.

Note alſo
The Rule is, That Counſel may move, on the laſt Day of Term, To *quaſh* an INDICTMENT; but
Not to quaſh an *Order*.

The Court was not up, till near Midnight.

The End of *Trinity* Term 1758. 31 *Geo.* 2.


BRITISH MUSEUM
8
45
DEC

A

TABLE

OF THE

PRINCIPAL MATTERS

Contained in *this* Volume.

Account ſtated. See *Debt, Extinguiſhment, Pleading.*

IS *no Extinguiſhment* of the original Debt. *Page* 9

Action

Of Trover. See Title *Trover.*
Of Treſpaſs. See *Treſpaſs.*
Of Ejectment. See *Ejectment.*
Of Debt *upon an Award itſelf* differs much from an Action of Debt *upon* the Arbitration-*Bond.* 280 to 282. See *Arbitration.*
On the *Arbitration.*
On the *Caſe,* on 12 G. 1. c. 29. §. 1, 2. *Page* 332. See *Declaration on Bail-Bond.*
On *Indebitatus Aſſumpſit.* 375. See *Declaration.*
On a *Note.* 375. See *Declaration.*
On a *Bail-Bond* given in a *County Palatine,* on an Action *brought there,* muſt be brought in that Court below, and *not here,* unleſs there be *ſpecial Circumſtances* to warrant it: Proceedings were therefore ſtayed, in the Action here. 642.
By Huſband and Wife (*Pariſh-Poor*) againſt a *Juſtice of Peace,* for committing the WIFE (as well as the Huſband) to the Houſe of Correction, for *returning to the Pariſh* from

from whence they had been legally removed without bringing a Certificate. *Page* 596 to 603. See *Pariſh-Poor*.

Ad quod damnum

Is the only legal Authority for *altering* a Road. 465.
Incloſing a Road. Ibid.
Repairing the *new* Road. Ibid. See *Highway*.

Alienation of *Land*

Could not be made, according to the *ancient feudal Law*, without the *Lord's Concurrence:* And the *Form of Conveyance* was by *Feoffment*, publicly, notoriouſly and ſolemnly made. 107.
The Statute of Quia Emptores Terrarum (18 E. 1.) took away *Sub-Infeudations*; and gave *free Liberty* of Alienation to the Tenants of *Subjects*, and to thoſe who held of the King *as of an Honour or Manor:* And other Statutes extended the Power of Alienation, to the *King's Tenants in Capite*. 158.

Ambaſſadour's *Domeſtic Servant*

Muſt be *Bona Fide*, ſo, in order to be privileged under 7. Ann. c. 12. Whereas this was a *Land waiter* at the Cuſtom-houſe. 401.

Amendment

Shall *not* be made, *after* the Court can not help ſeeing that the Matter is *upon Record*; (as giving Leave "to withdraw a Demurrer and plead to Iſſue," *after other Iſſues* joined in the ſame Cauſe have been actually tried, and Verdicts found, with contingent Damages:) For the whole muſt be *ſuppoſed* to be ſtill *in Paper*. 322.

Amotion. See *Diſfranchiſement*.

Apprentice. See *Trade*.

Apprenticeſhip

Where not previouſly neceſſary to an UNACTING Partnerſhip in Trade. *Page* 5 to 10. See Trade and Trader.
Exerciſing a Trade *without having ſerved One*. See *Statutes* 5. Eliz. c. 4. §. 31. and *Indictment*.

Arbitration,

Arbitration, Arbitrators.

Awards are *now* considered with *greater Latitude* and *less Strictness* than formerly: And 'tis right that they should be *construed literally and favourably*, and *not* scanned with critical Nicety. *Page* 277, 278.

Yet they must be *certain* and *final*; that is, certain to a *common Intent*, and consistent with *probable Presumption*, and *sufficiently*, in effect, *mutual and final*. Ibid.

In an Action of Debt brought *upon* the *Award itself*, the Plaintiff needs shew forth *nothing* MORE than is *necessary to support* his Claim and intitle him to the Thing demanded: *All else* must come on the *Defendant*'s Part. But it is quite otherwise, if the Plaintiff brings his Action of Debt *upon* the Arbitration-BOND: In *that* Case, he must set forth the *whole* Award. 280. 281. 282.

Assise of NOVEL DISSEISIN

Was *introduced* (probably from the Usage of Normandy) in or before the Reign of *Hen.* 2. and was considered as a *Benefit* and *Indulgence*. 107.

Both the Legislature and the Courts of Law *extended* this Remedy, for the Sake of the true Owner, to *every* Trespass or Injury done to his Real Property; if, by bringing his Assise, he thought fit to *admit* himself disseised. 110.

The Reports of Assise can only relate to Cases where the true Owner *admits* himself to be disseised. *Ibid.*

Against whom this Remedy *lay*. Ibid.

Assurance. See *Insurance*, *Policy*.

Attachment

Granted against the Plaintiff's Attorney, for *putting the Name* of an Attorney of this Court to the Process, *without* his Authority. 20.

What *Sort* of Attachment may be moved for, on the last Day of a Term. 651. See *Practice*.

Attaint.

The Writ of Attaint is *now* a *mere Sound*, in *every* Case: And, in *many*, it does not pretend to be a Remedy. 393. See *New Trial*, *Practice*.

Attorney.

Attorney.

An Attorney's *Name* put to Proceſs, without his Authority. 20. See *Attachment*.

An Attorney of this Court having, by *mere Colluſion* and with Intent to ſecure the Buſineſs ariſing from the Priſoners, taken one of the *Turnkeys* of the King's Bench Priſon for his *Article-Clerk*, the Articles were *cancelled* in Court, by Order of the Court, and ordered to be kept there. *Page* 291.

Award. See *Arbitration*.

Bail

FOR a *Bankrupt* who obtains his *Certificate* pending the Action, ſhall be diſcharged, if the Certificate is obtained *before* they are *fixed*: But if not till *after* the Bail are fixed, then they remain liable. 244. 245.

Affidavit of the Debt being upwards of 10*l*. (in a Superior Court) and the Sum ſworn to to be *marked* on the Back of the Writ or Proceſs. See *Statute* 12 *G*. 1. *c*. 29. §. 1. 2. and *Declaration on Bail-Bond*.

For a *Soldier*—How they may *ſurrender* him, in their own Diſcharge. 339. 340. See *Soldier*, *Habeas Corpus*.

Shall have *Time to ſurrender* their Principal, *after a Writ of Error* brought by him; but *upon different Terms*, according to the different Circumſtances. 340.

1. If the Bail apply *within Time* allowed for ſurrendering the Principal, the Terms are "That they pay the Money, "or ſurrender the Principal, *within* 4 *Days after* the "Writ of Error ſhall be affirmed." *Ibid.*

2. But if they do *not* apply *within* that Time, then they ſhall have only the 4 Days to pay the Money; but *no* Alternative of ſurrendering the Principal. *Ibid.*

3. 'Tis the *Allowance* of the Writ of Error, that *is the proper Superſedeas*: The *Notice* of its being allowed, is only to bring the other Party into Contempt, in Caſe he ſhould *proceed ſubſequently* to ſuch *Notice*. *Ibid.*

An *Exoneretur* was ordered to be entered (upon the Bail's ſurrendering the Principal;) But, by the Omiſſion of the Officer, was *not actually* entered. The *Plaintiff knew* of the Surrender: His Attorney did not; but *ſued Scire facias*

faciaſes againſt the Bail, into London, where the *Original Cauſe of Action* was: Theſe Scire faciaſes were holden irregular;

1ſt. Becauſe the *Plaintiff* Himſelf was *apprized of the Surrender*. 409.

2dly. Becauſe they were not ſued into *Middleſex*, where the *Bail-piece remained, after* the Surrender. *Ibid.*

Bank-Notes.

A Bank Note payable to Wm. Finney or Bearer, on Demand, was ſent into the Country by the General Poſt. The Mail was *robbed*, and this Note taken out. This Note (for £21: 10: 0, only) being ſo *ſtolen*, was paid to an Inn-keeper, for a *full and valuable Conſideration*, and in the *uſual Courſe amd Way of his Buſineſs*, and *without any Notice or Knowledge* of this Robbery or of its being taken out of the Mail. Payment was ſtopped at the Bank. The Note was brought thither, for Payment. The Caſhier refuſed to pay it, or to *redeliver* it. *Trover* was brought by the Inn-keeper: who had Judgment againſt the *Caſhier*. 453 to 460.

1ſt. Bank-Notes are treated, and are to be conſidered as *Money*, or *Caſh*; *not* as Securities or Documents for Debts. 457, 459.

2dly. They paſs by *Deviſe*, as *ready Money* or *Caſh*. Ibid.

3dly. Neither *They*, nor *Money*, can be purſued and recovered, *after* they have *fairly* and *bona fide paſſed in Currency*; even *though ſtolen*. 458.

4thly. But *before* They or the Money have paſſed in Currency, an Act will lie for *Either*. Ibid. And ſo it will, againſt the *Finder* of the Money or of Bank-Notes; *before* Payment away in Currency. *Ibid.*

5thly. Bank-Notes are *not* like *Lottery Tickets*: Which are *identical* and *ſpecific*, and whereof *mere Delivery* may make *no Change of Property*. 459.

6thly. It is neceſſary, for the Purpoſes of Commerce, that their *Payment* ſhould be *eſtabliſhed* and *ſecured*. Ibid.

7thly. But it may be reaſonable to *ſtay Payment*, till Inquiry whether the Bearer came *fairly* by it, and for a *good and valuable Conſideration*. Ibid.

Bankrupt.

The *Property* of a Bankrupt's Goods is AFTER *Aſſignment*, in the Aſſignee, from the *Time* of the Act of Bankruptcy, by *Relation*. 31, 32, *v. infra*. 440. & 817 to 820.

And

And the Aſſignee may maintain *Trover* againſt the Sheriff who *took* them in Execution after the Act of Bankruptcy, and *before* the Aſſignment, but SELLS them AFTER *the Aſſignment*: For SELLING was certainly unlawful, whatever the Taking might be. *Page* 31. 32. 33. And See Title "*Trover*."

Bail for a Bankrupt, who obtains his *Certificate* pending the Action, ſhall be diſcharged, if the Certificate is *prior* to their being FIXED: Otherwiſe they remain liable. 244. 245.

But the *Bankrupt Himſelf*, though diſcharged of the *Original* Debt, is yet LIABLE to the Judgment in an Action againſt Him *upon the Bail Bond*: For this is a *new* and *diſtinct* Cauſe of Action. 436.

By 21 *J.* 1. *c.* 19. § 2. A Trader who, being arreſted for Debt, ſhall after ſuch Arreſt *lie in Priſon for two Months*, upon that *or any other* Arreſt or Detention in Priſon for Debt; Or, being arreſted for 100l. or more, ſhall *eſcape* out of Priſon; (or procure his Enlargement by putting in common or hired Bail, repealed by 10 Ann. c. 15. §. 1.) ſhall be accounted a Bankrupt, to all Intents and Purpoſes; And in the ſaid Caſes of Arreſt or *Lying in Priſon* for ſuch Debt or Debts, (or getting forth by common or hired Bail,) *from the* TIME *of his or her ſaid* FIRST *Arreſt*.

1ſt. All the *Bankruptcy-Acts* muſt be *conſtrued* according to their *real Intention*, and ſo as to *anſwer the Ends* of public Benefit. 439. 440.

2d. ESCAPE means a Running-away *contrary* to the *Sheriff's Conſent*; not where, by *Permiſſion of the Sheriff*, He is carried through another County, on his Road to a Judge's Chamber upon a Habeas Corpus: *This* ſhall not make him a Bankrupt and Criminal. *Ibid.*

3d. Where SUFFICIENT *Bail* is fairly put in, and the Defendant afterwards at a future Day *ſurrendered*, the Bankruptcy ſhall *not* relate to the *Time of the firſt Arreſt*; but only to the Time of the *Surrender*. Ibid. For the Bankruptcy * commences only from ACTUAL *Lying in Priſon*. Ibid. * v. *ſupra*, 31. *infra*, 817 to 820.

4th. But when Bail is put in, merely with *Intent to ſurrender immediately*; and they do ſo, *eo Inſtanti*, and the Defendant is *inſtantly committed* Cuſtod. Mar: *This* is only *Form*, and (in Effect) *no Bail at all*, but a *Continuation* of the ſame Impriſonment: And therefore the Bankruptcy ſhall here *relate to the* FIRST *Arreſt*. Ibid.

A *Conveyance* made by a Trader, of his WHOLE Subſtance, to a *particular* Creditor, was, under all the *Circumſtances* of it, adjudged to be *fraudulent* and an *Act* of Bankruptcy; although it was made by way of *Security*, and for a *valuable*

luable Conſideration and executed (but without Delivery of Poſſeſſion) *three Weeks before* any other Act of Bankruptcy. The principal Circumſtances were, That the Trader *continued in Poſſeſſion*, and viſibly *acted as Owner*; That the Reſt of the Trader's Creditors were impoſed upon by *falſe Appearances*; That the Agents of this particular Creditor told the Reſt of the Creditors. "That the Trader had mortgaged "his Leaſeholds," but *concealed* his having aſſigned any thing elſe; That both the particular Creditor and his Agents appeared clearly to be *aware* "that *Poſſeſſion was neceſſary*;" but had *contrived* and originally intended "That there ſhould "be a Delivery of Poſſeſſion, as ſoon as the Trader ſhould "determine to become Bankrupt; but not ſooner; in order "to *evade* the Clauſe in 21 *J.* 1. *c.* 19. § 2. In *other* Reſpects, this Conveyance was fair and honeſt; being intended to ſecure one De Mattos, in London, from being a ſufferer by the Country Traders *Overdrawing* upon him; De Mattos having agreed to permit Slader, the Country Trader, to draw upon him in London, and to *advance* as far as 300l. for Slader. Reſolved

1ſt. That this Conveyance was *fraudulent*, and an *Act* of Bankruptcy within the 1 *J.* 1. *c.* 15. §. 2. *Page* 467 to 485. v. *infra* 829 to 833.

2d. *All* the *Bankrupt-Acts* are to be taken *together*, as *One Syſtem* of Law: And they are to be conſtrued *favourably for Creditors*, and to *ſuppreſs Fraud*. 474.

3d. *Indemnity* was a *good* and *valuable Conſideration*: And this Deed was a *fair* Tranſaction, As between the *Parties*. 474. v. *infra* 830.

4th. But many Tranſactions, fair as between the *Parties*, may yet be *fraudulent* as to *third Perſons*, by reaſon of Deceit upon or Injury to *them*. 474. v. *infra* 830.

5th. *This* was one of thoſe Caſes: The Creditors were deceived by *falſe Appearances* connected with a ſecret *Confidence*. 475. The *End* and the *Means* were both unlawful. *Ibid.*

6th. The *End was unlawful*. For

1ſt. The *Preference* aimed at, was fraudulent and unlawful. *Ibid.*

2dly. *Preference* of a favourite Creditor, by an Aſſignment of *All*, after making and juſt before executing a Determination to break, even if accompanied with a formal *Delivery of Poſſeſſion*, is a Fraud upon the whole Bankrupt-Law; and would defeat the two main Objects of it, viz. the *Management* of the Bankrupt's *Eſtate*, and an *equal Diſtribution* of it amongſt *all his Creditors*, who have truſted to his *general* Credit. 476.

3dly. In like manner, a Conveyance *calculated* to *poſtpone* a particular Creditor is an Act of Bankruptcy. 477.

4thly. *Priority* ſhall not be gained by *ſecret Liens*. Ibid.

5thly. Therefore Conveyances of *perſonal* Chattles, by way of Security, where POSSESSION *is left with the Bankrupt*, ſhall *not* give any Priority. *Page* 477.

6thly. But Conveyances of *Land*, are different: For Land is holden, *without* Perception of Profits, *by the* TITLE. *Ibid.* and 484.

7thly. There is alſo a *great Difference* between Conveyances of All, and of a *Part* only. The Latter *may* be *public*, *fair* and *honeſt*: But the former *muſt* either be *fraudulently kept Secret*, or produce an immediate Bankruptcy. 478. v. *infra* 830.

7th. The *Means* likewiſe were unlawful, as well as the *End*; namely, the *falſe Credit* given to the Bankrupt, by leaving him in Poſſeſſion, and to act as Owner; and the *ſecret Truſt* " to deliver the *Poſſeſſion*, *ſo as to avoid* " the Clauſe in 21 *J.* 1. *c.* 19." 482. 483.

8th. No Deed, made by a Trader, can be fraudulent in a *Court of Equity*, which is not *fraudulent at Law*, and an *Act of Bankruptcy*. 479. 481.

9th. Every *equivocal* Fact may be *explained* by Circumſtances: None, more than *Deeds*; for hardly any Deed is fraudulent, upon the mere *Face* of it. 484.

Baron and Feme.

A Huſband and Wife are conſidered as one, in Matters of Evidence; and cannot be *Witneſſes* the *one for the other*. The Huſband can not be *Witneſs* for his Wife, in a Queſtion concerning *her ſeparate Eſtate*. 424.

The WILL of a *Feme-Covert* made under an Agreement with her Huſband previous to Marriage, giving her *Power to make a Will*, muſt be PROVED in the Spiritual Court; though it operates as an Appointment. And *Legacies* appointed under it, ſhall *lapſe*. So it has been ſettled in Chancery. But the Spiritual Court can *not* treat it as a Will, by granting *ſtrict Probate* of it. 432. However, they may grant *Adminiſtration*, with ſuch Appointment *annexed*: Which proves it to be *teſtamentary*. Ibid. And attended with all the *Conſequences* of a Will. *Ibid.*

1ſt. The *Fact*, " that the Paper *was* actually her Will, muſt be eſtabliſhed by the *Eccleſiaſtical* Court. *Ibid.*

2dly. But if the Queſtion turns upon her *Power* to make it, *That Queſtion* muſt be diſcuſſed in the *Common Law* Court: And if ſhe had *no ſuch Power*, then a Prohibition ſhall go. 433.

Separated, by *Articles* of agreement made in conſideration of money received by the huſband, and with covenant " never to " diſturb

" disturb his Wife, or any Person with whom She " should live."

1st. The Husband cannot *seize* her, or *force her to live with him.* 452.

2d. Such an *Attempt* would be a *Breach of the Peace.* Ibid.

3d. And a *Contempt of the Court*, if molested in her *Return from thence*, being brought up by a *Habeas Corpus.* Ibid.

Bishops

May *grant* ANCIENT OFFICES, with the *ancient Fees*, in the same manner as they have been USUALLY granted *before* the Act of 1 *Eliz. c.* 19. For an Office and Fee which *existed before* that Statutute, is *not within* the restraining Clause of it, either in Word or Intent; But may be granted *since* the Statue, precisely in the *same manner* as it was granted *before*: And *such* Grants are *no Dilapidation of the Revenue*, nor bring any *new Charge* upon the *Bishoprick.* 221 to 226.

The *Utility* or *Necessity* of such an Office is no more material *since* that Statute, than it was *before* it: It is totally *immaterial.* Ibid. For the Question turns solely upon the *Usage.* Ibid.

At *Common Law*, a Bishop, *with the Confirmation* of his Dean and Chapter, might exercise *every* Act of *absolute Ownership* over the Revenues of his See; and *bind his Successors*, as much as Tenant in Fee can bind his Heir. 221.

Bonds—

Limitation of them; (i. e. their being supposed to be satisfied.) 434. See *Limitation.*

By-Law,

In *Restraint* of Trade, is *not* good, *without* setting forth a *particular* Custom to support it. 16. 17.

Such a particular Custom cannot be *presumed*, if not set out. *Ibid.*

A By-Law (of the City of London) to *confine* a Person who has a Right to be free of the City, to take up his Freedom *in some one* PARTICULAR *Company*, is a RESTRAINT *of Trade*; And not a mere Regulation of it. *Ibid.*

Of a Company, " to elect upon their Livery, *such* and so " many of their Members as should *seem* most meet and " convenient to them; on pain to forfeit 25l. on refusing " to accept, or to pay the Admission-Fee."

1ſt. This is a *good* By-Law. 239. 240. For the Court will *not preſume* the Party elected upon the Livery to be un*fit* or *im*proper for it. Ibid. And

2dly. If the Party was *really* unfit and improper, or had any other reaſonable Excuſe, "*Nil debet*" may be pleaded to the Action of Debt upon the By-Law: which will bring it properly before the Court; either by giving it in Evidence, or on Iſſue taken upon it. *Ibid.*

By-Laws ought to have a *reaſonable*, not a very rigid Conſtruction. *Ibid.*

A By-Law returned to have been *made by the Body at large*, may be good, where the POWER is by Charter given to a *ſelect* Number "to make By-Laws in the *Stead*, *for*, "and in the *Name* of the *whole* Corporate Body:" For they *might* be, in Fact, made by the ſelect Body *acting in the Name* of the whole Corporate Body; And the Jury having found "That the Body at large in *due manner* met "and in *due manner made* them," It ſhall be ſo INTENDED. 131.

A By-Law to *prevent* any Perſon from being made *free* of a Company, UNTIL He ſhall have been *called at three ſeveral Meetings* of the Mayor and certain Aldermen of a City, and the Wardens and Stewards of the ſeveral Companies in it, BEFORE *his Admittance*; and to be *approved of* by them or the Majority of them, is good; and is *not a Reſtraint* upon Trade, but a *reaſonable Regulation* of it. 131.

A Mandamus will lie to *compel* ſuch a Meeting. *Ibid.*

A Mandamus will lie, if they *arbitrarily* and *without Cauſe* REFUSE to approve a proper Candidate. *Ibid.*

Such *Meetings*, though not expreſsly returned to have been holden, ſhall be *intended* to have been duly holden: For if in Fact they were not, it might have been pleaded by the Candidate as an Excuſe for his not having been called and approved by them, previouſly to his Election. 132.

The Jury having found "That He was not called and approved, PURSUANT to the By-Law," implies that the By-Law was *in Being* at that Time, and not made ſubſequently. 133.

Made "to GIVE *Power of Amotion* for juſt Cauſe"—would be a *good* By Law; though the Corporation who made it, had *no* Power of Amotion expreſsly given by Charter, or claimed by Preſcription. 539.

Caſes doubted or denied.

4 *Leon.* 9. *pl.* 39. was taken not to be Law now: per Lord *Manſfield. pa.* 6.

1 *Ventr.* 146. *Dyer* v. *Eaſt.* denied. 244. See *Statutes* (5. 6. *E.* 6. *c.* 4.) and *Prohibition.*

2 *Ld. Raym.* 767. *Regina* v. *Taylor*—denied: Settled contra ſince. 252. See *Indictment.*

1 *Ld. Raym.* 724. *Cole* v. *Davies et al'* 1ſt Poſition ("That "no Action will lie againſt the *Sheriff*—) denied. 36.

Dyer 253. *b. pl.* 102.
Cro. Eliz. 217. *Green* v. *Edwards.*
1. *Co.* 153. *b.* Rector of *Cheddington*'s Caſe.
Sheppard's Touchſtone. 274.
} See *Term of Years*, and *Deeds.*

3. *Lev* 334. 335. *Goodwin* v. *Blackman.* 330.

Yelverton 58. *King* v. *Goſper and Shire.* 412. 413. See *Common Recovery.*

11 *Co.* 99. *a. Bagg*'s Caſe, 2d. Reſolution—denied. 538. 539. See *Diſfranchiſement.*

Certiorari.

On 5, 6. *W. & M. c.* 11. § 3. *No Coſts* are payable; unleſs the Indictment be brought by the *Party aggrieved*, or by Juſtices, Mayors, *&c.* or other *Civil Officers* proſecuting *as being ſuch.* 431.

May be *ſuperſeded, quia improvidè emanavit*; the *Return* taken *off the File*; and Orders remanded. 488. 489. See *Quakers.*

Chancellor.

The Earl of Hardwicke, Lord Chancellor, reſigned the Seal. 20.

Three Lords Commiſſioners received it. *Ibid.*

Chancery.

Decreeing Deeds fraudulent. *Pa.* 480. 481. See *Fraud. Bankrupt.*

Common

Is only a Right of *eating the Graſs*, in a certain Place, by the Mouth of the Commoner's Cattle: But the Lord remains *Owner of the Soil*: and may enjoy it *conſiſtently* with his Grant, but *not contrary* to it. 265 to 268.

The Lord may place *Conies* upon his own Soil, though liable to Common. *Ibid.*

The Commoner *may not chaſe, kill*, or *deſtroy* the Conies; though, by their Increaſe, there is *not ſufficient* Common left: Much leſs may He *deſtroy the Burrows*, or *dig the Lord's Soil* for that Purpoſe. For the Lord's Act not being

being contrary to his Grant, the Commoner muſt take his *proper Remedy*. Ibid.

Indeed where the Lord acts *contrary to his Grant*, as by *incloſing*, and erecting Obſtructions to keep the Commoners *out*, and not leaving ſufficient, the Commoner may pull down the *Hedges* or Erections. *Ibid.*

But where there is only a *Sur-Charge* by the Lord, a mere *Exceſs of his Right*, the Commoner is *not* to be his own Judge, and to treat it as a Nuſance *abatable*. Ibid.

In a Juſtification under a Right of Common, Two eſſential Circumſtances are, "That the Cattle be the Defendant's "*own*," and "That they be levant and couchant." 320. See *Pleading*.

Common Recovery.

The *Riſe*, *Nature*, and *Hiſtory* of Common Recoveries, diſcuſſed at large. 115.

They are *now* a mere *Form of Conveyance*, allowed (under certain Circumſtances of Form and Ceremony) to Tenants in *Tail in Poſſeſſion*, generally; and to Tenants in *Tail in Remainder*, with *Conſent* of the Owner of the firſt *Eſtate for Life*. 116.

A Recovery ought *not* to be *ſupported*, where the Parties had *no Power to ſuffer it*. 116 to 119. See *infra*, *ſub* 1072.

The Statute of 14 G. 2. *c.* 20. proceeds upon the Parties to the Recovery having *Power to ſuffer it*. 116. See *infra*, *ſub* 1074.

A *ſecret Feoffment* under a *naked* Poſſeſſion, is not ſufficient to ſupport a Common Recovery ſuffered by the Remainder-Man. 117.

Thoſe who have *no Power to ſuffer* a Recovery, ſhall not, by making an Eſtate by *Wrong*, or *Fraud*, or *Practice*, *bar* thoſe in Remainder or Reverſion: And ſuch *fraudulent Eſtate* is as *no* Eſtate, in the Judgment of the Law. 117.

For, a Recovery which the Parties had no Power to ſuffer *directly* and *without* ſuch fraudulent Eſtate, ſhall *not* be made good by *Wrong* and *Fraud*. Ibid.

A *Feoffee* to the *Intent to be Tenant to the Præcipe*, is a *mere Inſtrument* for *one* Purpoſe of *Form* only: His Wife ſhall *not be endowed*; His Statutes or Judgments ſhall *not affect the Land*; His Term ſhall not merge. *Ibid.*

A Man ſhall not, *by his own injurious Feoffment*, acquire an Advantage *to himſelf*: An Act *founded in Wrong* ſhall not, *by Virtue of the Crime itſelf*, become legal, for the *Author's Advantage*. 118.

On a Writ of Error to *reverſe* it, there muſt be a *Scire facias* againſt the TERRE-TENANTS. 361.

1ſt. This is neceſſary, not by *Law*, but by the *Courſe of the Court*. Ibid.

2dly. The *Want* of it is (per Lord *Manſfield*) *only an Irregularity*. Ibid.

3dly. The *Terre-Tenant* has *no Intereſt*; is *no Party* to the Suit; can *not plead* in *Abatement*; can plead *Nothing but a releaſe of Errors*. 362.

4thly. *Non-Tenure* pleaded by the *Terre-Tenant*, is (conſequently) a *frivolous Plea*: And He ſhall *anſwer over*. Ibid.

Error to *reverſe* One (ſuffered by the Tenant in Tail) brought *by the Remainder-Man in Fee*; Who aſſigns for Error, "the *Death of the Vouchee*, before Judgment;" and concludes with an *Averment*: Which Vouchee was the Tenant in Tail Himſelf. "In nullo eſt erratum" was pleaded. Judgment reverſed. 412.

1ſt. The Writ of Error *needs not* ſet forth a *complete Title*: It is enough, if it ſhews *Connexion and Privity* between the Perſon who brings the Writ, and the Perſon againſt whom the Recovery was had. 412, 413.

2d. A *Scire facias* to the *Heir* is not neceſſary; nor any *Warning to him*. Ibid.

3d. *Death of the Vouchee*, before Judgment—may properly be *aſſigned* as Error. *Ibid.*

4th. The *Concluſion* of this Aſſignment, with an *Averment*, is right. *Ibid.*

5th. The Pleading "*in nullo eſt erratum*," *confeſſes the Fact* aſſigned for Error. 413.

6th. The *Remainder-Man* has a *Right*, both in Law and Equity to reverſe this Recovery, if erroneouſly ſuffered. *Ibid.*

Confeſſion

Of a Charge, "in *Manner and Form as charged*," confeſſes no more than ſuch Matter *ſo* charged; and *no further*. 613. See *Conviction*.

Conies

Placed upon *commonable Land*, by the Lord. See *Common*.

Conſtruction

Of Statutes——

1ſt. There is a Diſtinction between Things *eſſential*, and Clauſes *merely directory*. 447.

1ſt. The *preciſe Time* is not always eſſential. 447, 450.

2dly. Nor "*in or* NEAR the Pariſh or Diviſion." 447.

3dly. But *Number* is eſſential. *Ibid.* to 451.

2d. *Special Authorities* given to Perſons who have no other Claim to them, muſt be *ſtrictly purſued.* 447.

3d. *Negative words* are not neceſſary, to exclude from Juriſdiction Perſons who had no power before. *Ibid.*

4th. *Different* Statutes in *pari materia*, (though made at *different Times*, or *expired*, or *not referring* to each other,) muſt be conſtrued *together*, and as *One Syſtem*, and as *explanatory* of each Other: As *Bankrupt*-Laws, *Poor*-Laws, *Church*, *Leaſe* Laws &c. 447.

Of *Deeds*, eſpecially ſuch as execute *mutual Agreements for valuable Conſideration*, ſhould be *liberal*, *ut res magis valeat*, according to the *Intent.* 285.

Conviction

On the *Game* Acts——

It muſt be *particularly and negatively ſpecified* "That the "Defendant had *not* ANY of the Qualifications required "by 22, 23 *C.* 2. *c.* 25." 153 to 156.

Though perhaps the *general* Averment "that the Defendant was not qualified within the Acts," may be ſufficient in an *Action.* 153. *Sed. Qu. per* Foſter. 155.

The *Evidence*, and the *Adjudication* ought, *Both* of them, to be "that the Perſon convicted had not the Qualifications "ſpecified in 22, 23 *C.* 2. *c.* 25. nor any of them:" *Per Deniſon.* 154. See *ſupra* 153, and *infra* 682.

For *offering to Sale* a Parcel of Silk Handkerchiefs, and *trading* AS *a Hawker*; *Pedlar*, or *Petty Chapman*, and *not producing a Licence*, when required; which the Defendant *confeſſed* in MANNER AND FORM *as charged*: Quaſhed, becauſe He does not appear to be SUCH a Trader as *ought* to take out a *Licence* within the Acts of 8, 9 *W.* 3, *c.* 25. § 1, 2, 3. 9, 10 *W.* 3. *c.* 27. § 1, 2, 3. 12 *W.* 3. *c.* 11. and 3, 4 *Ann. c.* 4. § 1, 4. 613, 614.

1ſt. A *ſingle Act* of Selling is *not* a Proof of his being ſo, *Ibid.*

2dly. The *Confeſſion* does *not* prove his being ſo: Becauſe it is only a Confeſſion of the Fact *in Manner and Form as charged.* Ibid.

3dly. *Convictions* are to be taken *ſtrictly.* 613.

Copyhold.

If a Copyhold is granted for a Term of *Years*, the *Executor* of the Termor is obliged to be *admitted*: And the Lord is intitled to a *Fine*, upon ſuch Admittance. 218

Coroner. See *Deodand, Inquiſition.*

If the Coroner *neglects* to make an Inquiſition, *other* Juriſdictions may do it. 19.
But their Inquiſitions are traverſable. *Ibid.*
So alſo are the Coroner's: *Per* Lord *Mansfield. Ibid.* (Qu. If thoſe of *Felo de ſe* are here included. 18, 19.)

Corporation: Corporator—

How to be *taxed.* 156 to 158. See *Tax.*
A Company's Right to have a *Livery* muſt be founded on Charter or Cuſtom: The Court *cannot preſume* that they have it. 237. And if the Declaration (in Debt upon a By-Law fails to *ſhew* it, 'tis ſuch a Fault as the Defendant may take Advantage of, upon *general* Demurrer. *Ibid.*
Freedom of a Corporation may be reſtrained by By-Law. 132, See *By-Law.*
Election—given to "the RESIDUE (of the Portmen) or the "*greater Number* of THEM, *aſſembled* in the Council-"Chamber:" was made by ONE *ſingle* Portman *only*, being the ONLY *One* left: The Court *inclined* to *ſupport* this Election; and declared this to be their Inclination, if it had been material to have determined it upon that Point; (which it was not, becauſe They judicially determined the Caſe upon another Point.) 541.
Diſfranchiſement. 517. See *Diſfranchiſement.*

Coſts

On diſcharging a Recognizance. See *Recognizance.*
On a feigned Iſſue. 603, 604. See *Feigned Iſſue.*
Upon frivolous Applications. See *Execution, Information.*

Covenant

In a *Building and Repairing Leaſe*, "to leave the DEMISED "*Premiſſes*, with all new Erections, *well repaired*,"—was conſtrued to extend to the *new* Erections *only*; a Sum of

of Money being agreed to be laid out in *new* Erections and *Re*-building; and the Covenant "to *keep* in Repair," extending *only to new* Erections. 290, 291.

Court.

The *Rules* and *Practice* of it. See *Practice*.

Rules of it—The great End of General Rules being "to do "Juſtice," The Court ought to ſee that it be *really* attained. 301.

Spiritual—See *Prohibition*. 243, 244, and 315, and 367, 368, and 432.

Inferior. See *Inferior Courts*.

Of *Equity*—cannot decree a *Deed made by a Trader* to be fraudulent in Equity, which is not *fraudulent at Law* and an *Act of Bankruptcy*. 479, 481. See *Bankrupt*. See poſt. 1108. under Title *Court*.

Damages

EXCESSIVE. See *Verdict*.

Debt,

Extinguiſhment of it. See *Extinguiſhment*. *Pleading*.

Declaration

De benè eſſe, may (in certain Caſes) be delivered at the Return of the Proceſs, with *Notice* "for the Defendant to "plead within eight Days after ſuch Delivery:" And if the Defendant ſhall not file Common Bail, and plead within ſuch eight Days, the Plaintiff (having firſt filed Common Bail for the Defendant) may ſign Judgment for want of a Plea, (a Rule "to plead" being duly entered). 55, 56.

Sundays included in theſe eight Days, ſhall *not* be reckoned Part of them. 56.

Leaving in the Office is a good *Delivery* of ſuch a Declaration. 56, 57.

No freſh Declaration, freſh Notice, or freſh Rule to plead is neceſſary in the above Caſe. 56.

A Judgment *ſigned ſix Weeks after* ſuch Delivery of the Declaration *de bene eſſe*, was holden regular. *Ibid.*

On

On a By-Law of a Company, in Debt, for not taking the Livery of it, muſt ſhew that the Company had a *Right* to a Livery: Otherwiſe it may be taken Advantage of, upon a general *Demurrer*. 237. See *Corporation*.

On a *Promiſſory Note*. See *Promiſſory Note*, and *infra*, 375.

Upon a BAIL-*Bond*—needs not ſet forth "that there was an "Affidavit of the Debt," or "that the Sum ſworn to "was marked on the Back of the Writ." 332. For

1ſt. The Act of 12 G. 1. *c*. 29. § 1, 2. is *only Directory*; and does *not* make the Proceſs *void*. *Ibid*.

2dly. Yet as it *prohibits* the *Plaintiff* and the *Sheriff* from proceeding to Arreſt, unleſs the Sum be ſworn and marked, *They* may be *liable to an Action* upon the Caſe for it. *Ibid*.

Upon a *General Indebitatus Aſſumpſit*: Firſt Count, for 19l. *lent and advanced*, at the Defendant's Requeſt; Second Count, for 15l. *laid out and expended*, at the Defendant's Requeſt. The *Evidence* to ſupport the Firſt Count, was a *Note* acknowledging the Receipt of the Money *on Behalf of* the Defendant's Grandſon (an Infant) and promiſing to be *accountable* for it on Demand: To ſupport the 2d Count, a *Note* requeſting the Plaintiff to pay it ("It is my Re- "queſt that you pay it") *to the Infant's Gardener*, for the Workmen's Uſe. This Evidence *does ſupport* the Declaration. 375, 376. For

1. Tho' *Indebitatus Aſſumpſit* will not lie, *upon* a Note; (becauſe *Indebitatus Aſſumpſit* will not lie, *but where* DEBT *will lie*;) yet it may be brought FOR *the* DEBT; And the Note may be *given in Evidence*. Ibid.

2. This is an *original* Undertaking, *not collateral*. Ibid.

3. The *Infant* was *not liable* to an Action. *Ibid*.

Upon a *Preſcriptive Right*—

1ſt. If there are *diſtinct collateral* Preſcriptions, the Plaintiff needs not to *ſhew* any more than his own. 443 to 445.

2d. But if the Preſcription be *entire*, and the thing *Parcel* of the ſame Preſcription or a *Condition precedent*, He muſt ſhew the Whole. *Ibid*.

3d. So He muſt againſt the *Owner*, or thoſe who have Right. *Ibid*.

4th. But againſt a *Stranger* and *Wrong-Doer*, He needs not. *Ibid*.

Deeds,

Eſpecially ſuch as execute mutual Agreements for valuable Conſideration ought to be *conſtrued* liberally, and agreeably to the obvious and apparent *Intention* of the Parties. 285, 286.

A Leaſe, by Indenture between the Leſſor and a Mother *only*, (her Eldeſt Son being then under Age,) was made to her for 99 *Years*, if ſhe ſhould ſo long live; Remainder to her ſaid Eldeſt Son, for and during the Reſidue of the ſaid TERM;

TERM: Yet the Court held this Leaſe to be clearly *intended* for the Benefit of *both Mother* AND *Son*; and that He and his perſonal Repreſentatives ſhould enjoy during the whole Remainder of the 99 YEARS; It appearing that the Son was to pay a *Penalty*, if He ſhould grind at another Mill; and that a *Heriot* was payable by Him on the Death of his *Mother*, and that *both ſhould quietly enjoy*. Ibid.

Priority of Execution of Deeds of equal Date, is a *Fact*. But, if not found, the Court may judge of it by *Circumſtances* and *internal Evidence*: They may even make a *Preſumption*, in ſupport of the clear Intention of the Parties. 106, 107.

Demurrer

General. The Want of *ſhewing a Right* in a *Company* "to "have a *Livery*," in a Declaration in Debt upon a By-Law, for not taking it, may be taken Advantage of, upon a *general* Demurrer. 237.

May not be *withdrawn* (with Liberty to plead Iſſue,) *after Trial* of other Iſſues in the ſame Cauſe, and Verdicts found with Contingent Damages: Though this may be done, *after Argument* of the Demurrer, and whilſt all is *ſuppoſed* to be *in Paper*. But the Court cannot help *ſeeing* that all is *not* ſtill in Paper, after ſuch Trial as above. 322.

Deodand. See *Coroner*, *Inquiſition*.

Deviſe

Of all the Teſtator's Real Eſtate (except that at *Endellyon*,) and of the *Perpetuity* of his Preſentations, to *L. H.* for his *Life* AND NO LONGER; provided that He take the Name of the Teſtator, and live at his Houſe of *Bochym*; and after his Deceaſe, to ſuch SON as He *ſhall* have, lawfully begotten, taking the Name of *Robinſon*; and for Default of *ſuch* Iſſue, then to *W. R.* in Fee—is, upon the true Conſtruction of this Will, an Eſtate in TAIL *Male* in *L. H.* (He and the Heirs of his Body taking the Name of *R.* by *neceſſary Implication*, to *effectuate* the *manifeſt general Intent* of the Teſtator; NOTWITHSTANDING the *expreſs* Eſtate deviſed to the ſaid *L. H.* "for his *Life* AND NO "LONGER." 50, 51, 52.

Of all the Teſtator's Meſſuages, Lands, &c, to two Truſtees and the Survivor of them and the *Heirs* of ſuch Survivor, In Truſt for the Benefit of the Teſtator's two Nephews; *viz.* that the Truſtees and the Survivor of them, his

his *Heirs* and Aſſigns, ſhall lay out the Rents and Profits, for the *Maintenance*, *Education*, *Bringing up*, and *Putting out* his two Nephews, DURING *their* MINORITIES: And WHEN and AS they ſhould attain their reſpective ages of 21, to be and remain to the *two Nephews and their Heirs*, equally. And He made the two Truſtees, his Executors.

1ſt. Wherever the *whole* Property is deviſed, with a particular Intereſt given *out of it*, the Operation of this is by Way of *Exception* out of the abſolute Property. 233, 234.

2dly. Where an *abſolute* Property is given; and a *particular Intereſt* given, in the *mean Time*, "*until* the Deviſee "ſhall come of Age &c; And *when* he ſhall come of "Age, then to Him, &c;" The Rule is that this ſhall *not* operate as a Condition *precedent*, but as a Deſcription of the Time when the Remainder-Man ſhall *take* in POSSESSION. *Ibid.*

3dly. This Deviſe to theſe two Truſtees is *only an Exception out of* the abſolute Property given to his Nephews: Or, indeed, ſcarce any Exception at all, as it is a Truſt to be executed for *their* Benefit. *Ibid.*

4thly. It is *only* a CHATTEL-*Intereſt* in the Truſtees, notwithſtanding the Word "HEIRS:" For it cannot laſt 21 Years. 234.

5thly. This is an *immediate* Gift to the two Nephews, and *veſts* in them *immediately*; with a *Truſt* to be executed for *their Benefit*, *during* their Minority. *Ibid.*

In conſtruing Wills—

1ſt The *Intention* of the Teſtator ought to prevail, if agreeable to the Rules of Law. 233. So 272, 273.

2dly. *Adjudged Caſes* may properly be argued from, if they eſtabliſh *general Rules* of Conſtruction. 233.

An Ordinary Man made his *own* Will, without any Aſſiſtance; Which begins, "As to *all* my worldly Eſtate, "&c:" Then He gives ſome *ſmall* Legacies payable in a Twelve month. Then (being ſeiſed of ſome Copyhold Land, and of five Houſes,) He deviſes one of the Houſes "*to W. T.*" (without any further Limitation;) making other Gifts to other Relations. Then He ſays, "That "if *Either* of the Perſons before-named die *without Iſſue* "lawfully begotten, the *ſaid Legacy* ſhall be divided "equally between them that are left alive." Note—One of the Legatees was Father to three of the Deviſees. Reſolved *per Cur'*.

1ſt. This is an Eſtate *Tail* in *W. T.* 272, 273.

2dly. The *Intention* of the Teſtator is to be here regarded. *Ibid.*

3dly. He plainly *meant* to extend the Word *Legacy* to his Deviſes of *Land*; and *not to confine* it to *pecuniary* Legacies. *Ibid.*

4thly. The Word *Legacy* may be extended to Deviſes of Land. *Ibid.*

5thly. A *Pecuniary* Legacy cannot be limited after a *Dying without Iſſue.* Ibid.

Of an *illiterate* Man, drawn *by Himſelf*, written upon Part of a *Sheet of Paper*; making his Wife ſole *Executrix*; leaving the Intereſt of ſome Stock, to help to bring up his Daughter. "I likewiſe have two *Freehold Houſes*, "&c. Which are to be for the *ſame Uſe*, to help to "bring up my Daughter *Laviner, and her* HEIRS FOR "EVER. And if it pleaſe God my Daughter die BEFORE "*her* MOTHER, and unmarried and without a lawful "Heir, THEN the ſaid two Houſes *to go to my Son* JOHN "*and his Heirs* for ever." (*John* was Heir at Law.) This Will he *ſubſcribed:* But it was neither *ſealed nor witneſſed.* About two Years after, He wrote a *farther Memorandum* on the SAME *Sheet of Paper*, bequeathing ſome *Perſonal Chattels* only; and therein declares "*This not* "*to diſannul* any of the former Part made by me on 2d "*May* 1752." *This* LATTER He ſubſcribed in the *Preſence of three Witneſſes*; took the *Sheet of Paper* in his Hand; *declared* IT to be his laſt Will and Teſtament, in their Preſence; *delivered it to them*, and *deſired them to atteſt* and ſubſcribe it in his and in each other's Preſence: Which they did.

1ſt. This *whole* Sheet is to be taken as *One entire* Will. 554 to 556.

2d. This latter Act is a *good Publication* of the *whole* Will, within the Statute of Frauds. *Ibid.*

3d. The *Intereſt* deviſed to the *Wife* and *Daughter*, are 1ſt. If not a *Chattel*-Intereſt to the Mother, and a Fee to the Daughter; 555, 556. Yet

2dly. At leaſt, *ſuch* an Intereſt in *One* or *Both*, as is ſufficient to *bar John*, the Heir at Law and Deviſee in Remainder, of his Ejectment. 554 to 556.

A Deviſe of *Lands* was atteſted by three Witneſſes, *Squire*, *Baxter*, and *Higden*. *Baxter* and *Squire* were Attornies, and had been employed by the Teſtator to ſolicit a private Act of Parliament for Sale of another Perſon's Eſtate, and had charged the *Teſtator Debtor* to them, in their Books; and 318l. was *owing* to them at the Time of Atteſtation and Death: But They afterwards delivered a Bill to the Truſtees in the ſaid Act (which contained a Proviſion for the Charges of paſſing it;) and *before their Examination* received of the Truſtees within about 16l. of their Demand, and the Truſtees were willing to have paid the Remainder, if it had not been for a Miſcalculation. And at the Time of Atteſtation, theſe Attornies were indebted to the Teſtator 1381. 14s. 10d, upon the Balance of a Current Account for *other* Buſineſs. *Higden* was the Teſtator's *Apothecary*;

thecary: And there was due to Him from the Teſtator, at the *Atteſtation and Death*, 18l. 5s. 5d. *on ſimple Contract*; *viz.* 11l. before the laſt Sickneſs; the Remainder, ſince. The Teſtator's Executor *paid Higden* this 18l. 5s. 5d. after the Teſtator's Death, but before *Higden's Examination:* And at the Time of his *Examination*, He had *no Demands*. The Will *charges* the Teſtator's *Real* Eſtate (as well as the Perſonal) with all his juſt *Debts*. But the *Perſonal* Eſtate was *ſufficient* to pay all his Simple Contract and Bond Debts: And the Real Eſtates in Mortgage were of Value more than ſufficient to ſatisfy the reſpective Incumbrances.

Objection—"That theſe ſubſcribing Witneſſes were *not*, at "the Time of their atteſting it, CREDIBLE *Witneſſes*: "And therefore it was *not a good* Will of *Lands*, within "29 *G.* 2. *c.* 3. as not being atteſted by three *credible* "Witneſſes." But *per Cur.* unanimouſly, This Will was DULY atteſted by three Witneſſes.

1ſt. The Epithet "*Credible*" is not ſynonimous to *Com-* "*petent.*" *Page* 417.

2. The Conſideration of *Credibility* ariſes *after Competency allowed*: and preſuppoſes the Evidence given. *Ibid.*

3. The *Credibility* of the Witneſſes makes *no Part* of the *eſſential Form*. Ibid.

4. This Epithet, "*Credible*," ſeems to have ſlipped into the Act, in this *inaccurate* Clauſe, without Attention to its Impropriety. 418.

5. The Act of 29 *C.* 2. *c.* 3, was *not*, probably, drawn by Lord Chief Juſtice *Hale*. Ibid.

6. The *Power of deviſing* ought to be *favoured:* And that Act of 29 *C.* 2. *c.* 3. did *not* mean to *reſtrain* it. 420. Its *Riſe* and *Progreſs*. Ibid. It is *more* reaſonable *now*, than among the *Greeks* and *Romans*, or before the Conqueſt: And *why* it is ſo. *Ibid.*

7. Judges ought to lean *againſt Objections to the Formality* of Deviſes of Land; which have overturned more fair Wills, than prevented fraudulent Ones. 421.

8. The Diſability of a Witneſs, from *Intereſt*, differs from a *poſitive* Incapacity: And *nice Objections* of *remote Intereſt* ſhall not diſqualify a Witneſs, in Caſe of a Will. 422.

9. A Witneſs ſhall not *intitle Himſelf* to a Deviſe, by his own Subſcription, which, at the Time of ſubſcribing, He could not have proved by his Examination: (For *Teſtis in propria Cauſa non adhibendus.*) But if He had *as great an Intereſt*, the other Way; if his Intereſt, at the Teſtator's Death *could not take Effect*; if He has

has *releaſed*; if there has been *Payment*, or even *Tender*; He is a *good* Witneſs. *Page* 423, 424.

10. For *Preſumptions of Bias* may be *taken off*; and Preſumptions of *public Utility*, *anſwered*. Ibid.

11. If Land is *charged with Legacies*, by a proper ſolemn Deviſe, the Legacies may be *given*, *altered*, or *revoked*, by a ſubſequent Will UNATTESTED. Ibid.

12. Preſumption of *Bias from a Legacy*, is taken off by a *Releaſe*. Ibid.

13. An Objection to a Witneſs, of "*Benefit at the "Time of ſubſcribing*," MAY be *taken off* by his being diſintereſted *at* or *after* the *Death*: (Though Lord Chief Juſtice *Lee* did indeed think it could *not* be taken off by *any ſubſequent* Fact.) 423 to 429.

14. And this is conſiſtent with the *Roman Law*. Ibid.

1ſt. There *never* was a Time when *Intereſt* under a Will was, in the *Roman* Law, *any Objection* to the ſubſcribing Witneſs. 425.

2dly. The *Roman* Law concerning Teſtaments and Witneſſes to them, fully *ſtated* and *explained*. Ibid. and 426.

3dly. The *Code* was publiſhed *tertio Juſtiniani*; The *Digeſt* and *Inſtitutes*, *ſeptimo*. Ibid.

15. Deviſes of *Land* differ extremely from *Wills*: And *how*. 429.

16. A Deviſee under a *void* Deviſe, being a *ſubſcribing Witneſs*, may by his Subſcription authenticate the *Reſt* of the Will: At leaſt, there is great Weight in the Diſtinction ſaid to be laid down by *Holt* Chief Juſtice, "That ſuch Will is *only* void, QUOAD *the De-* "*viſe to the Witneſs*. 428, 429. [N. B. This is contrary to the Opinion of Lord Chief Juſtice *Lee*, *Ibid.*]

17. A *Charge* upon Land "*to pay Debts*," ought *not* to *incapacitate* ſubſcribing Witneſſes, who are Creditors; even though they wanted and claimed the Benefit of it: (Which, in this Caſe, they did not.) 430.

18. Every honeſt Man *ought* to make *ſuch a Charge* in his Will. *Ibid.*

19. The moſt *uſual* Witneſſes are generally, in *ſome* Degree, *Creditors* of the Teſtator, (as Servants, Attorney, Parſon, Apothecary, *&c*;) And the *Diſallowing* ſuch Witneſſes can *anſwer no End* of public Utility. *Ibid.*

Diſ-

Disfranchiſement—See *Amotion.*

May be for *three* Sorts of Offences, *viz.* 1ſt. Such as are *infamous* in their Nature; but have *no Relation* to the Corporator's *Office*, AS *a Corporator*: 2dly. Such as are *only* againſt his *Oath and Duty*, AS *a Corporator*; 3dly. Such as are of a *mixed* Nature; being *not only* againſt the *Duty of his Office* as a Corporator, but *alſo indictable* at Common Law. *Page* 538.

Firſt—For the *firſt* Sort, there muſt be a *previous Conviction* at Common Law, before Disfranchiſement; (as in Caſes of general Perjury, Forgery, Libelling *&c*;) *Although* the Corporation *have* Power of Amotion, by Charter or Preſcription. 539.

Secondly—For the *ſecond* Sort (where the Offence is *merely* againſt his Duty *as* a Corporator,) He can be *tried* for *ſuch* Offences, *only by* the Corporation. 539.

POWER *of Amotion* is INCIDENT to Corporations, as much as the Power of making By-Laws: And therefore the Propoſition *collected* from *Bagg*'s Caſe, namely, "That they "can have *no* Power of Amotion, *unleſs* given by Charter "or Preſcription," is *not true*. Ibid.

CAUSE *of Amotion*—ABSENCE of a Portman (whoſe general Duty is "to *attend every Great Court*, and *adviſe and aſſiſt* "the Bailiffs,") from five of theſe Courts in one Year, (four of them, occaſional, and the fifth on a ſtated Day,) of the holding whereof reſpectively, DUE *Notice* had been given, but NOT PERSONAL *Notice*; without any Allegation "That the Portman's Preſence was *neceſſary*," or "That "any *particular* Buſineſs was *obſtructed* by his Abſence," is *not* a Cauſe ſufficient, either of Forfeiture or Amotion. 540, 541. For

1ſt. The Perſon amoved *might not know* of the occaſional Courts, as He had not *perſonal* Notice. *Ibid.*

2dly. Or He *might not think* his Preſence *neceſſary*. Ibid.

3dly. Or He *might not* imagine that there was any *particular Buſineſs*. Ibid.

4thly. *Every* Alderman, Common-Council-Man *&c*, in *England* would be liable to Disfranchiſement, if it was otherwiſe: Becauſe every one of theſe does, at Times, knowingly omit attending. 541.

5thly. Though the Charge here is of a "WILFUL Abſenting," yet that is only a *Conſequence of Law*; and there are *no iſſuable Facts* alledged, whereby the Court can judge "Whether the Abſence was wilful, "or not." 540.

Diſſeiſin.

The *Idea* of it, according to the *Old Law*, *before* the *Aſſize of Novel Diſſeiſin*. *Page* 107 to 114.

The *preciſe Definition* of what conſtituted a Diſſeiſin, ſuch as made the Diſſeiſor the *Tenant to the Demandant's Præcipe*, though the right Owner's Entry was *not* taken away, is not *now* known. 110.

It was, ſome way or other, turning the Tenant *out of his Tenure*, and *uſurping* his Place and *feudal Relation*. 107, 109, 110. It was a complicated Fact; and *differed* from *Diſpoſſeſſing*: The Freeholder by Diſſeiſin *differed* from a *Poſſeſſor* by Wrong, or mere *Intruder without Inveſtiture*. 109, 110.

Caſes where the true Owner thinks fit to *admit* Himſelf diſſeiſed, in order to bring his Aſſiſe, are *very different* from *actual* Diſſeiſins *in Spite* of the true Owner, *i. e.* from ſuch Diſſeiſins as made the Diſſeiſor *Tenant to every Demandant* and *Freeholder*, *de facto*, in *Spite* of the true Owner. 107 to 114.

Diſſeiſin ever *implies* a *Wrong*: But *Diſpoſſeſſion* or *Ejectment* may be by Right, *or* by Wrong. 111.

Diſſeiſin *at Election* is therefore very different from *actual* Diſſeiſin: Though the ſame Term happens to be applied to Both. 111, 112.

The *Conſequences* of *actual* Diſſeiſins (conſidered *as* ſuch) continue Law to this Day. 112.

Where an *Ejectment* is brought, there *can be no* Diſſeiſin. 111. See *Ejectment*.

Taking Poſſeſſion *under a Judgment in Ejectment* is *not* a Diſſeiſin of the *Freehold*. 113. Nor can the true Owner even *elect* to make it ſo. 114.

For the Entry is under Authority, and *lawful*; and therefore *not* liable to be puniſhed by *Fine*, (as *every* Diſſeiſin was.) *Ibid.* Nor can the true Owner *enter* upon ſuch Recoveror *as* a Diſſeiſor. *Ibid.*

Diſtreſs

Averia Carucæ are *diſtrainable* under 43 *Eliz.* for *Poor-Rates*; and under ſuch *like Acts of Parliament*; although there be other Goods, more than ſufficient to anſwer the Value. 587, 588. For

1ſt. The Diſtinction is—That ſuch Seizings for ſuch Duties are *but partly* analogous to the *Common Law* Diſtreſs; but much more analogous to Common-Law *Executions* 588.

2dly.

2dly. *Common Law* Diſtreſſes were to *compel Payment*; were *only detained, Nomine Pœnæ*; and could *not be ſold:* Whereas *theſe* are by Way of *Satisfaction* for the Debt; are Diſtreſſes *in Execution*; and are to be *ſold* outright, and almoſt immediately. *Page* 588.

3dly. The *Statute* of 51 *H.* 3. *de Diſtrictione Scaccarij* does *not extend* to theſe. *Ibid.*

4thly. The *Common-Law Exemption*, of Utenſils, Tools, Implements of Huſbandry &c, from Diſtreſs, *holds only* in Diſtreſs, for *Rent*-Arrear, *Amerciaments*, &c; but doth *not extend* to the Caſes where a Diſtreſs is given, in the *Nature of an Execution*, by any particular *Statute*, (as for Poor Rates &c.) *Ibid.*

A Diſtreſs for an *entire Duty* ſhall *not* be *ſplit*; and a Diſtreſs taken for PART of the entire Sum at *one* Time, and for *other Part* of it another Time: (For that is great Oppreſſion.) 589.

But if the Seizure be at firſt for the *Whole*; and only the *Value* of the Goods *miſtaken*; the Execution may be *compleated by a ſecond* Seizure, provided it be for the *ſame Sum* due. 589, 590.

Exceſſive—A *General Action of Treſpaſs* can not be maintained, for taking an exceſſive Diſtreſs: The Remedy ought to be by a *Special* Action, founded on the Statute of *Marlbridge*. 590.

Ejectment

WILL *lie*, by the *Owner of the Soil*, for Land which is Part of the King's High-Way. 143 to 147.

For *the Owner of the Soil* has a Right to *All above and under Ground*; Except only the Right of *Paſſage*. Ibid.

Indeed He muſt recover the Land, SUBJECT *to the Eaſement:* And the Sheriff muſt deliver Poſſeſſion, SUBJECT *to the Eaſement*. Ibid.

But yet He ought to have and has a *ſpecific Remedy* to recover the *Land itſelf*. 144

Of an Acre of *Land*, deſcribed only by the Name of LAND, tho' (in Fact) there was a *Wall* and a *Porch*, and *Part of a Houſe* built (by Encroachment) upon it—

1ſt. The *Deſcription* of this, as LAND, is ſufficient:—For the Owner claims the Land, not the Nuſance erected upon it. 144, 145, 146.

2dly. More *Latitude* is allowed in Ejectments, than in real Actions: *Sufficient Certainty* is enough, in Ejectments. 144.

The Plaintiff ſhall recover *according to his Title*, where He demands more than He has a Title to: For where *more* is laid, there is no Reaſon why He ſhould not recover *leſs* than He demanded; though the *Reverſe* will *not* hold. *Page* 329, 330.

Againſt Two: One died, after Iſſue joined, but before Trial.

1ſt. The Death muſt be *ſuggeſted on the Roll*, by 8, 9 *W.* 3. *c.* 11. § 7. But it is enough, if it be ſo on the *Plea*-Roll: But on the *Niſi Prius* Roll, there needs be no more than enough to *notify to the Judge*, "What He is to try, and between whom." 366.

2. The *Judgment* needs not ſay "*quod Querens Nil* "*capiat per Billam* againſt the *dead* Defendant;" It being therein ſaid "That *all Proceedings ſhall ſtay* "againſt Her." 364, 366.

3. The *Judgment* is *not* to be "for a *Moiety* only": It muſt be "that He *recover his Term.*" But He muſt take out *Execution* for no more than He had a *Right* to recover. *Ibid.*

Brought by the *Landlord* againſt his *Tenant, under and by virtue of* 4 *G.* 2. *c.* 28. § 2. and Judgment had againſt the caſual Ejector, *by Default*; and *Poſſeſſion thereupon delivered.* Near 20 Years after, the *Tenant brings an Ejectment* againſt the ſame Landlord, for the ſame Premiſſes. The Landlord (who is Defendant in this latter Ejectment) is NOT *obliged to* PRODUCE ſuch an *Affidavit* as this Clauſe requires as an *eſſential Requiſite previous* to his original Recovery: For, as it was eſſentially requiſite, the Court will *preſume* "That there was One regularly then "made, and that the Judgment was founded upon it." 615 to 622. See *Statutes.*

In *Ireland*, was affirmed upon a Writ of Error here, *after a Verdict* in *Ireland* in *C. B.* and an Affirmance in *B. R.* there: Though many of the Deſcriptions were *unknown in England.* 624 to 631.

1ſt. The ſame *Preciſion* is *not* requiſite in this fictitious Action, as in a *Præcipe* in a real Action 629 to 631.

2dly. Nor ſo much Strictneſs as was *formerly* required even in Ejectments themſelves. 630.

3dly. It is ſufficient, without ſo preciſe an Exactneſs that the *Sheriff may know* without any Information, what He is to deliver Poſſeſſion of: For the Plaintiff is to *ſhew the Sheriff*, and at his own Peril to take Poſſeſſion of *only* what he is intitled to. 629, 630.

4thly. In *Ireland*, the following Deſcriptions were (after Verdict and Affirmance of the Judgment there *ut ſupra*) held ſufficient: *viz.*

1. In the *County* of *R.* without naming any particular Vill. 624.

2. *Town* and *Tenement* of *Boyle*, and the *Fairs and Markets* thereunto belonging. *Page* 625.
3. *Quarter*. Ibid.
4. *Part of S. M*, and *D*. Ibid.
5. A large Deer Park *in the County* of *R*. Ibid.
6. A ſmall Park or Field in the Poſſeſſion of *A. B*. not ſaying *where*. Ibid.
7. The Quantity and Quality of the Lands not particularized. *Ibid*.

Where an Ejectment is brought, there can be no *Diſſeiſin*. For the Plaintiff may lay his Demiſe, when the *Title accrued*; and recover the *Profits from the Time of the Demiſe*. And the Entry confeſſed is previous to the making the Leaſe: But there is *no* real or ſuppoſed *Re-entry*, *after* the Ejectment. Whereas, if it was conſidered as a *Diſſeiſin*, no meſne Profits could be recovered *without* an *actual Re-entry*. 111. See *Diſſeiſin*.

A *Judgment* in Ejectment is a Recovery of the *Poſſeſſion*, without Prejudice to the *Right*: And He who enters under it, can only be *poſſeſſed, according to the Right, prout Lex poſtulat*. 114.

And He who recovers a *naked Poſſeſſion* only, without Right, can *convey no other* to his Feoffee. *Ibid*.

An Ejectment is a *poſſeſſory* Remedy; and only competent where the Leſſor of the Plaintiff *may enter*. 119.

Therefore it is always neceſſary for the Plaintiff to *ſhew* "that his Leſſor had a *Right to enter* by *proving a Poſſeſſion* "*within* 20 *Years*, or *accounting for the Want of it*, under "ſome of the *Exceptions* allowed by the Statute of Limi-"tations. 21 *Jac*. 1. *c*. 16." *Ibid*.

Twenty Years adverſe Poſſeſſion is a *poſitive Title* to the Defendant: It is not a Bar to the *Action* or *Remedy* of the Plaintiff, only; but takes away his *Right of Poſſeſſion*. Ibid.

Every Plaintiff in Ejectment muſt *ſhew a Right of Poſſeſſion*, as well as of *Property*: And therefore a Defendant in Ejectment *needs not* PLEAD the Statute of Limitations, as Defendants in *other* Actions muſt. *Ibid*.

Upon a *Special Verdict* in Ejectment, it ought to *appear* "that the Leſſor of the Plaintiff *might enter*, at the Time "*when* He brought the Ejectment." *Ibid*.

A *Leaſe under a Power*, made *unfairly* and in *Prejudice of thoſe in Remainder*, found in the *Cuſtody of the Maker* at his Death, *amongſt his own Muniments*, ought, at the Trial, to be *preſumed to have been ſurrendered*; to let in the Statute of Limitations. 126.

Error.

The *Allowance* of a Writ of Error is the *Superſedeas*: The *Notice* of its being allowed, relates only to the *Contempt* in proceeding ſubſequently to ſuch Notice. *Page* 340. See *Bail.*

To reverſe a *Common Recovery.* See *Common Recovery.*

To reverſe an *Outlawry.* See *Outlawry.*

On a Judgment in Ejectment, where *B. R.* determined *for* the Plaintiff, upon the *Right*; but *againſt* Him, upon the *Remedy*; (for They held him *barred by the Statutes of Limitations*:) The Lords, on Error brought by the Plaintiff, determined the *latter Point*, firſt and *ſeparately*; And, holding the Plaintiff *to be* barred, affirmed the Judgment, *without ever entering* into the *other* Point, (upon the Plaintiff's *Right.*) 126, 127.

Eſcape.

Such as ſhall make a Trader a *Bankrupt.* 439, 440. See *Bankrupt.*

Evidence—See *Proof.*

A *Commiſſion* under the *Exchequer-Seal* (tho' a Commiſſion of *Inſtruction* only, *not* of *intitling*,) is *admiſſible* in Evidence, (though *not concluſive.*) 147.

Where a *Note* may be given in Evidence: And where it does or does not *ſupport the Declaration.* 375, 376. See *Declaration.*

Extinguiſhment

Of an Original Debt. See *Pleading.*

Factor.

A Factor or Agent, to whom a *Balance is due*, has a LIEN upon all Goods of his Principal conſigned to Him; not only for incident Charges, but as an *Item* of mutual Account for the *general Balance* due to Him: ſo long as He retains the *Poſſeſſion* of them: But if He *parts with the Poſſeſſion* of the Goods, He parts with his *Lien.* 494.

Feigned Iſſue.

The *Coſts* upon it were directed to be taxed, FROM *the Time* when it was FIRST *ordered* by Conſent of the Parties; (including the Diſputes about *ſettling* it, but Nothing prior to its being conſented to.) *Page* 603, 604.

Feme Covert—See *Baron and Feme.*

Separated from her Huſband. 542. See *Baron and Feme.*
Her *Will*, under a Power to make One. 432. See *Baron and Feme, Deviſe.*

Feoffment

In *general*—The *Operation* of it. 92. *(per Knowler, arguendo.)*
The Nature and Operation of a Feoffment with a View *only* to make a Tenant to the *Præcipe.* 115 to 119.
A Feoffee to the *Intent to be Tenant to the Præcipe*, is a *mere Inſtrument* for *One* Purpoſe of *Form* only: His Wife ſhall *not be endowed*; Nor his Statutes or Judgments *affect the Land*; Nor his Term (if He has One) *merge.* 117.
A Man ſhall not, by his *own injurious* Feoffment, acquire an *Advantage to Himſelf:* For an Act *founded in Wrong* ſhall not, *by Virtue of the Crime itſelf*, become Legal, for the Author's Advantage. 118.

Fines *payable to Lords*—

On *Copyholds* granted for Terms of *Years.* 209 to 219. See *Copyhold.*

Fraud.

Fraud or Covin may, in Judgment of Law, *avoid* every Kind of Act. 395.
INVALIDATES *as much* in a *Court of* LAW, as in a Court of *Equity.* 391 to 396.
" What Circumſtances and Facts *amount* to Fraud or Covin," is always a Queſtion of *Law.* 396. V. *infra*, 474.
Courts of Equity, and Courts of *Law*, have a *concurrent Juriſdiction*, to ſuppreſs and relieve againſt Fraud: But the Interpoſition of the former is often neceſſary, for the *better inveſtigating* Truth, and to give *more complete* Redreſs, 396. V. *infra*, 480, 482.

" Whether

"Whether a Tranſaction be *fair* or *fraudulent*," is often a Queſtion of *Law*: It is the *Judgment of Law*, upon Facts and Intents. *Page* 474. V. *ſupra*, 396.

Courts of Equity cannot decree a *Deed* made by a *Trader*, to be *fraudulent*; which is not *fraudulent at Law*, and an *Act of Bankruptcy*, 480, 482. See *Bankrupt*.

Freedom

Of a *Corporation*—See *Corporation*, *By-Law*, *Mandamus*. 20.

Freehold, Freeholder—See *Seiſin*, *Diſſeiſin*.

The *Idea* of a Freehold and of a Freeholder, according to the *ancient Feudal* Law. 107 to 114.

The Idea which *modern* Times annex to Freehold and Freeholder, is taken merely from the *Duration* of the Eſtate. 108.

Game—See *Conviction*.

Grants

OF *Offices*, by *Biſhops*. 221 to 226. See *Biſhops*.

Great Seal

Reſigned by the Earl of *Hardwicke*. 20.

Delivered to three Lords Commiſſioners, *Willes*, *Smythe*, and *Wilmot*. Ibid.

Habeas Corpus.

AN *impreſſed Man* in Cuſtody at the *Savoy*, brought up by his *Bail*, to be ſurrendered in *their* Diſcharge, muſt be firſt committed to the Cuſtody of the *Marſhal*; who muſt *inſtantly deliver Him* to the Keeper of the *Savoy*. 339, 340. See *Soldier*.

Iſſued in Vacation, returnable *immediate* before the Judge *at his Chambers*, does *not expire* by the TERM's *coming on*,

(ſo

(ſo as to require a *new* Writ;) But the Defendant may be brought *into Court*, upon the OLD *Writ*. *Page* 460. V. *infra*, 542, 606.

And being then committed to the *Marſhal*, if He has no Bail ready: (for the Court can not commit Him to a King's *Meſſenger*;) He may be afterwards brought up *by* RULE from the Priſon of this Court, *without* being obliged to ſue out a *new Habeas Corpus*. Ibid.

Iſſued in Vacation: The Perſon was brought *into Court*, in *Term*-Time. 542. V. *ſupra*, 460.

For a *Wife*. 542. See *Baron and Feme*.

For a *young* Lady, who had been decoyed away from her Father; but now *deſired* to continue with Him. 606. This *Writ alſo iſſued in Vacation*: And was returned in Court, (*ut ſupra*, 460, 542.) 606, 608.

No *Peer* or *Lord of Parliament* hath *Privilege* againſt being *compelled by Proceſs* of the Courts in *Weſtminſter-Hall*, to pay *Obedience* to a Writ of *Habeas Corpus* directed to Him. 632. See *Privilege*.

For an *impreſſed Man*—The Rule was diſcharged, upon the Merits; but *without* Coſts. 637. And in another *impreſſed* Man's Caſe, the Man was diſcharged, upon the Merits: But the Court would *not give Him Coſts*. 638.

Hawkers, Pedlars and Petty-Chapmen.

A *ſingle Act* of Selling does not make a Man SUCH a Trader as that He ought to take out a Licence. 613, 614. See *Conviction*.

High-Way—

The *Owner of the Soil* may recover it in *Ejectment*; but *ſubject* to the Eaſement: And He has a Right to the *Freehold* and *all Profits* above and under Ground, except only the Right of Paſſage. 143 to 147. See *Ejectment*.

Nuſance NEAR it. 337, 338. See *Indictment for* a *Nuſance*.

Repair of Roads or Highways, INCLOSED by the Owner of Lands adjoining—

1ſt. Such Owner *may incloſe*, by his own Authority: But under *two Conditions*, viz.

1ſt. He is *obliged to repair*, *till* He throws up the Incloſure. 465.

2d. He muſt leave *ſufficient Space and Room* for the Road. *Ibid.*

2dly. An *open* Road lying through *open common Fields*, an Act of Parliament (a private Act 15 G. 2. c.) was made for incloſing and dividing them. The Com-

Commiſſioners directed a public Road acroſs them, (which Road had alſo exiſted before:) and then allotted the Lands. One, whoſe Lot adjoined to this open Road, incloſed it. He is *not* bound to repair it, under the general Rule (p. 465. *ut ſupra*:) But the *Hamlet remains* liable; as they were bound, before the Act, to repair the former Road. *Page* 465, 466.

Change or *Alteration* of a Road or Highway, muſt be by a Writ of *ad quod damnum*. 465

Repair of a Road *altered under an ad quod damnum*—

1ſt. The Owner of the Land is *not obliged* to repair the *new* Road; even though it was at firſt an *open* Road, and the *Jury direct it to be incloſed*. 465.

2d. Unleſs the Jury *impoſe* ſuch a *Condition* upon Him. *Ibid.*

Indictment

ON 5 *Eliz. c.* 4. may be found at a *City* or at a *Burrough*-Seſſions: It is (by 31 *Eliz. c.* 5. § 7.) only *reſtrained* from being brought OUT *of the County*. 251, 252.

For a *Nuſance*, in erecting Buildings at the PARISH of T. NEAR the King's Common High-Way there, and NEAR the Dwelling Houſes of ſeveral of the Inhabitants; and there Making acid Spirit of Sulphur *&c*, *&c*; whereby the Air was impregnated with NOISOME *and* OFFENSIVE Stinks *&c*: To the *Common Nuſance* of all *&c*, inhabiting *&c*, and paſſing *&c*.

1ſt. This is a ſufficient Charge of the *Hurtfulneſs*, under the Word "*noxious*" 336, 337, 338. However, *per* Lord *Mansfield*, *Unwholeſomeneſs* is not eſſential: It is enough, if the Smell be *ſo* OFFENSIVE, as to render the Enjoyment of Life and Property, *uncomfortable*. 337.

2dly, NEAR the High-Way, and NEAR the Houſes, is ſufficiently certain. 337, 338.

3dly. "At the PARISH" is laying it ſufficiently certain; without ſaying IN the *Town* or *Vill*. Ibid. And *per Deniſon*, "Vill" and "Pariſh" ſhall be conſidered as co-*extenſive*, except on the Statute of *Additions*, and that of Appeals of Death. 337, 338.

On a Statute (1 *J.* 1. *c.* 22. § 50.) giving Juriſdiction to the *Mayor* IN SESSIONS, an *Indictment* is the proper Method, as being the *ordinary* and *Common-Law Courſe*; (in which Courſe, this Juriſdiction ought to be exerciſed:) But

But an *Information* will not lie; but ſhall be quaſhed on Motion, becauſe there is no ſuch Juriſdiction given. *Page* 389, 390.

For a *Nuſance*, in *ſetting a Perſon* (for ſeveral Days) in the *Foot-Way of the public Street* in *London, to deliver out* PRINTED BILLS *of the Defendant's Occupation*; whereby the ſaid Foot-Way was greatly *obſtructed &c*— was QUASHED; as being a *Matter* NOT *indictable*. 516.

Lies NOT, upon an Act of Parliament which *creates a* NEW *Offence*, and preſcribes a *particular Remedy*. 545. (V. *infra*, 803 to 806.)

For *exerciſing a Trade*, contrary to 5 *Eliz. c.* 4. See *Trade, Soldier, Statutes.*

Inferior Courts.

Proviſo of 21 *J.* 1. *c.* 23. *viz.* § 6. That that Act (made to prevent *Removal of Suits*) ſhall *only extend* to ſuch as have an *Utter Barriſter* for Judge or Deputy, and who ſhall be actually *preſent* at the Trial. 515. See *Procedendo, Statutes.*

They may *ſet aſide regular interlocutory Judgments*, in order to let in a *Trial of Merits*: But can NOT *ſet aſide* VERDICTS, except for *Irregularity*; (*not* upon the Merits.) 571, 572.

Information

For a *Challenge*—was denied to the *firſt Sender* of it (though the other accepted it, and even propoſed, to fight with *Piſtols*:) and He was left to his *ordinary Remedy*, by Action or Indictment. 316.

For a *Challenge* — A Rule "to ſhew Cauſe" was granted, upon producing *only* COPIES of the Letters containing it: But ſuch Copies muſt be *ſufficiently verified*. 402.

This *extraordinary* Aſſiſtance ſhall *not* be given to *Cheats and Gamblers*, againſt *other Cheats and Gamblers* (who have fallen out together:) But the Court will leave them to their *ordinary Remedy*. 548.

Againſt *Juſtices of Peace*, for REFUSING *to grant a* LICENCE to an Inn-keeper, under 26 *G.* 2. *c.* 31. was denied. 556 to 565. V. *infra*, p. 653, 654. and p 1317, 1318.

1ſt. The Juſtices acting for the *Diviſion* have the SOLE *Diſcretion*, without any Appeal from their Judgment. *Ibid.*

2d. But if They *abuſe this Truſt*, by exerciſing this abſolute Diſcretion, with *Partiality*, *Malice*, or *Corruption*; and this be *clear and apparent*; They are liable to Proſecution by *Indictment* or *Information*, (poſſibly to an Action.) *Ibid.*

3d. *Not* for an *Error in Judgment*, if their *Heart and Intention be pure.* *Page* 563.

Information *in Nature of* Quo Warranto.

For HOLDING A COURT OF RECORD, *within a Charter-Burrough*, and *preſiding* therein, in the Abſence of the Bailiffs (to whom the Right of Holding it is given by the Charter:) He not being One of the Bailiffs: Which Information was brought by the Prothonotary and Clerk of the Crown of the Great Seſſion for *Denbigh*, at the *Relation* of *J. M.* Eſq; "ACCORDING *to the Form of the* "STATUTE." The Defendant denies the Fact; and then diſclaims. Judgment is given againſt Him; 1ſt. Of *Ouſter*; 2dly. "That the *Relator do recover his* COSTS, "ACCORDING *to the Form of the Statute.*" On which Judgment, Error was brought.

1ſt. This is no Charge of uſurping the *Office* of Bailiff. 407, 408, 409.

2d. The Act of 9 *Ann. c.* 20. § 4, 5. does not extend to the Exerciſe of ſuch Offices *in* Corporations, as *do not relate* to Rights of Freedom: It is confined to *Corporate* Offices, and Rights to Freedom or other *Corporate* Rights. *Ibid.*

3d. It never intended to give *Coſts*, in ſuch Caſes as the preſent; *not* being a *Corporate* Franchiſe, nor affecting Corporate Rights. *Ibid.*

4th. Yet a *Common-Law* Information in Nature of *Quo Warranto* will lie, for uſurping it without Authority. *Ibid.*

5th. The *Common Law Judgment*, "of *Ouſter*," was affirmed: The *Statute* Judgment "That the Rela-"tor recover his *Coſts*," was reverſed. 409.

Shall *not* be granted, *after great Length of quiet and unimpeached Poſſeſſion* of the Perſons under whom the Defendant claims: The preſent Caſe was 29 *Years:* For, though there be *no Statute* nor even fixed *Rule* of Limitation, yet the Court ought to exerciſe a Diſcretion, after a *great* Length of Time. 433, 434. V. *infra* 1962. 1963. 2524.

Four Informations were CONSOLIDATED *into* ONE, upon 9 *Ann. c.* 20. § 4. Which permits ſuch Leave of the Court, where the ſeveral Rights can be properly determined in one Information. 573.

Information *qui tam* &c.

For *exerciſing a Trade*, contrary to 5 *Eliz. c.* 4 *not* having ſerved an *Apprenticeſhip*.

1. Being *laid* at a Pariſh, is no Reaſon to *quaſh* it on Motion. *Page* 366, 367.
2. Qu. Whether that Act extends to *Villages*, (as well as to Cities, Market-Towns, and Towns Corporate.) 366, 367.
3. It needs not be averred that the Defendant did not *then* (at the *Time of the Making* of the Act) exerciſe the Trade. 367.

Information does *not lie*, where the Juriſdiction is given to a Mayor IN SESSIONS; as on 1 *J.* 1. *c.* 22. (about *Cutting of Leather*:) The Proceeding muſt be in the ordinary Way, *i. e. by Indictment*. 389, 390.

A COMMON Informer is not intitled to the ſame diſcretionary *Indulgence* of the Court, as the Party *really injured*, ſuing for Juſtice and *Reparation*. 402. See *Practice*.

Inquiſition—See *Coroner*.

If the *Coroner omits* to take an Inquiſition upon an *untimely Death*, it may be done by Juſtices of Gaol-Delivery, Oyer and Terminer, or of the Peace. 18, 19.

But it muſt be done *publickly and openly*. Ibid.

For, if it be found *ſecretly and privately*, it ſhall be quaſhed. 19.

Of *Inſtruction*; of *Intitling*. 147. See *Evidence*.

Inſurance—See *Policy*.

Double—

1ſt. As between the *Inſurers and Inſured*, upon the Principles of Commutative Juſtice, there is no Reaſon why the Inſurers ſhould not pay the *Whole*, even a double Inſurance; They having received a Premium for the whole Riſque. 492.

2dly. But, before the Introduction of *Wagering* Policies, it was ſettled (upon Principles of Convenience,) "That a Perſon inſured more than once ſhould *re-* "*ceive but one ſingle Satisfaction*"; and that the ſeveral Inſurers ſhould "All *contribute pro rata*." Ibid.

3dly. And it is exactly the ſame Thing, whether a Perſon makes both Inſurances in his *own Name*, or uſes the Names of *Others for his own Benefit*. Ibid.

4thly. The Act of 19 *G.* 2. *c.* 37. expreſsly *prohibits Reaſſuring*: unleſs the Aſſurer ſhall become *inſolvent*, or a *Bankrupt*, or *die*: And directs that even then, "it ſhall be *expreſſed* in the Policy, to be a *Re-Aſ-* "*ſurance*." 492, 493.

5thly.

5thly. The *Idea* of a *double* Insurance is, where the *same Person* is to receive DOUBLE SATISFACTION for the *same Loss*, by Reason of *his* having made *two* Insurances upon the *same Thing*. *Page* 493, 494, 494.

6thly. But *various Persons* may insure *various Interests*, on the *same Thing*; and Each, to the whole Value; (as the Master, for Wages; the Owner, for Freight; One Person, for Goods; Another, for Bottomree &c.) And this is not within the Idea or Reason of a double Insurance. *Ibid.*

7thly. If *One* Person insures the *Whole* with *one Set* of Insurers; And *Another* Person, with *another Set*; and the first Set are bound to pay the *Whole* to *their Insured*; They have a Right to *stand in his Place*, for a *Contribution* (if they can get it) to be paid by the other Set of Insurers to *them*. 495.

Intention *of the Parties*

Ought to prevail, both in *Deeds* and *Devises*, unless contrary to Law. 233, 272, 273, 285, 286. See *Construction*, *Deed*, *Devise*.

Issue—

Immaterial—See *Repleader*.

Judges *of B. R.*

At what *respective Times* the present Four were sworn-in. 1, 2.

Judgment

May be entered up *nunc pro tunc*, at the Discretion of the Court. 148 and 226.

As in Case of a Non-Suit. See *Non-Suit*.

In *Ejectment*, where *one Defendant dies* between Issue and Trial. See *Ejectment*.

Interlocutory, may be *set aside* by an *Inferior Court*, in two Cases; *viz.*

1st. For *Irregularity*. 571, 572.

2dly. *To let in a Trial of the Merits*; even though the Judgment be REGULAR. *Ibid.*

Jurisdiction

The *Want* of it, is a Reason for quashing an Information *upon Motion*. 388 to 391.

Juroʒs, Jury—

Special—Fined 20l. apiece, for neglecting to attend a Trial at Bar. *Page* 274. But the Fines were afterwards *taken off*, at the Deſire of thoſe who *did* attend. 274.

Are the *ſtrict and proper Judges* of Caſes depending entirely on *Circumſtances*; as Damages for *Criminal Converſation*. 609. See *Verdict*.

So where the *Evidence is nearly in Equilibrio*. 393, 394, 397. See *Verdict*, *Practice*.

But a Verdict *againſt Evidence*, or againſt *greatly preponderating* Evidence, may be ſet aſide. *Ibid.* See *Verdict*, *Practice*.

Trials by Jury—

Could not now ſubſiſt (in *Civil* Cauſes) without a Power *ſomewhere*, to grant *New Trials*. 393. See *Practice*.

Juſtices *of Peace*.

A Juſtice of Peace was appointed *Overſeer*. The Seſſions, upon his Appeal, diſcharge the Order which appoints him ſo; It appearing unto them "That He had for ſome Years "been, and was at the Time of the Nomination, and alſo "at the Time of making the Order of Seſſions an *acting* "*Juſtice of Peace* for the ſaid County, reſiding within the "ſaid Pariſh, and a ſubſtantial Houſekeeper there; and "alſo a *Lieutenant of Marines* in his Majeſty's Service "upon *Half Pay*; AND *that* there are OTHER *ſufficient* "Houſeholders within the ſaid Pariſh, for the doing ſuch "Office": They THEREFORE vacate the Order which appointed Him Overſeer; ſo far as it relates to Him. And this Court confirmed their Order; and quaſhed that of the two Juſtices which appointed Him.

1ſt. The *Seſſions* have a *Right of Judging* upon Appeal, with the *ſame Latitude* of Diſcretion as the two Juſtices had. 246, 257.

2dly. The Court will *intend* every Thing *in Favour* of the Juſtices, upon their *Orders*. *Ibid.*

3dly. They have *no Need* to give any *Reaſon*. Ibid. And if not, ſhall be preſumed to have acted on *proper* Grounds. *Ibid.*

4thly. If they give *bad* Reaſons, which contain their *whole* Reaſons, and manifeſtly conclude *againſt* them, their Orders will be bad. *Ibid.*

5thly. But if they give *only* an IMPERFECT Reaſon, or an *inconcluſive* One: (but not a *repugnant* One, or ſuch as the Court are *obliged* to judge to be their *whole*

whole Reaſon, and a bad One; the Court ought to *preſume* their Order to be *right*. *Page* 246, 247.

6thly. Qu. Whether the Offices of Juſtice of Peace, and of Overſeer in his own Pariſh, are *compatible*. Ibid.

7thly. Qu. Whether an *Overſeer* can appoint a Deputy. *Ibid.*

Refuſing to grant *Licences* to keep Inns, or to ſell Ale. 556 to 564, and 653. See *Licence, Information.*

Making a *Warrant of Diſtreſs* upon a *Poor-Rate*—

1ſt. No *Action* of Treſpaſs will lie againſt the Juſtices, though the Rate and Aſſeſſment be bad; If it has *never been appealed from*. 581, 587.

2dly. Nor upon the *Warrant*, not being void ſo as to make it a Treſpaſs *ab initio*. Ibid.

3dly. And the Juſtices can *not be Treſpaſſers*, by what the *Officers* afterwards do. 587.

Committing both Huſband AND WIFE, Pariſh Poor, RETURNING *to the Pariſh* from whence they had been legally removed, without bringing a Certificate. 595 to 604. See *Pariſh Poor.*

Land—See *Seiſin, Diſſeiſin.*

HOW *alienated*, in the Times of the ancient *Feudal* Law. 107. See *Alienation.*

Landlord. See *Rent, Tenant, Statutes.*

Leaſes—

Made *under Powers*. 120. See *Powers.*

A Leaſe is a Contract between Landlord and Tenant, by which *Both* are bound in *mutual* Stipulations: And it can be no Leaſe, unleſs ſome Perſon *agrees to hire* the Thing demiſed, and *to pay the Rent*. 122.

For, a *Sale*, and a Leaſe, are the *ſame Species* of Contract. *Ibid.*

Leather—

Cutting it. See *Statutes*—1 *Jac.* 1. *c.* 22. § 50. under p. 389, 390. and again under p. 498, 499.

Legacy—

Is a *veſted* Intereſt, when the *Time* is annexed to the *Payment only*; and *not to the Legacy* itſelf: Otherwiſe, where the *Time* is *Part of the Condition* of its *becoming* payable. *Page* 227.

The Term "*Legacy*" may be applied to *Land* as well as Money. 271 to 273. See *Deviſe*.

Licence—

To *keep an Inn*—The *Juſtices of the Diviſion* have the ſole Diſcretion. 556 to 565. See *Statutes* (26 *G.* 2. *c.* 31.) and Information (againſt Juſtices, for refuſing One.)

To *ſell Ale*. V. *ſupra*, and Information.

Limitation—

Of *Quo Warranto Informations*—See *Informations in Nature of Quo Warranto*.

Of *Bonds*—About 20 Years is commonly taken to be the *general* Time: But it has been left to a Jury, upon 18 Years (by Lord *Raymond*.) 434.

London—

Cuſtoms—

1ſt. If put in *Iſſue*, are *triable* by the Mayor and Aldermen, by the Mouth of their Recorder. 249. But there muſt be a proper *Surmiſe*, in order to this Method of Trial. *Ibid.*

2dly. The Recorder *certified ore tenùs* at the Bar: (Which has not been *actually done* at the Bar of *this* Court, within 200 Years paſt.) 248, 249, 250.

3dly. The Cuſtom certified by Him, was, "That if "One Perſon has a Houſe which has ANCIENT *Lights* "*fronting oppoſite* to or *over* an adjoining Houſe or "ancient Foundation of a *Houſe*, the Owner of the "latter HOUSE or ancient Foundation of a HOUSE, "may exalt his Houſe, or *rebuild* upon ſuch *ancient* "*Foundation* any *new Houſe*, to ANY *Heighth* that "he ſhall pleaſe, *againſt and oppoſite* to the ſaid an-"cient Lights of the former, and *thereby obſcure* "them": But this Cuſtom is *confined* to *Meſſuages* or HOUSES; and does *not extend* to OTHER *Erections or Buildings*. Ibid.

Mayor IN SESSIONS—His Juriſdiction upon 1 *Jac.* 1. *c.* 22. § 50. about cutting Leather. See *Statutes*.

Lords—

Lords—

Their *Privileges*. *Page* 632. See *Privilege*.

Mandamus—

TO *compel a Meeting* under a By-Law. See *By-Law*.
To *approve* a Perſon *arbitrarily* and *without Cauſe* diſapproved of. See *By-Law*.
To a *Viſitor* "to exerciſe his Viſitatorial Power *over the* "*Temporalties* of a Cathedral Church, concerning the "*intermediate Profits* during the *Vacancy of a Stall*"—*Denied*; as being a Matter proper for an Action at Law. 567.

Maxims

"*Boni Judicis eſt, ampliare* JUSTITIAM"—is the true Text: Not "*Juriſdictionem.*" 304.

Money—

Payment of it *into Court*. 578. See *Practice*.

Mortgage—

By Bankrupts. 477, 478. See *Bankrupt*.

Mutual Debts. See *Set-off, Statutes*.

New Trial—See *Practice, Repleader, Verdict*.

FOR *Exceſſiveneſs of Damages*. 609. See *Verdict*.
Is no more than having the Cauſe more deliberately conſidered by *another Jury*; when there is a *reaſonable Doubt*, or perhaps a *Certainty*, "That *Juſtice* has *not* been done." 393.
It is *neceſſary to Juſtice*, that unjuſt Verdicts ſhould be reconſidered. *Ibid.*

And

And it is always on Payment of *Coſts*, to the Party in Poſſeſſion of the Verdict. *Page* 394.

The Courts of *Law* grant New Trials of late Years, *more liberally* than they did formerly: And *why* they do ſo. 395

The *Grounds* on which they ought to be granted. 393 to 398.

Non-ſuit.

Action againſt *Two*; Judgment AGAINST *One*, by Default; Rule for Judgment FOR the Other, as in Caſe of a Non-ſuit, purſuant to 14 *G.* 2. *c.* 17. § 1. Yet this Defendant cannot have his Coſts taxed as in Caſe of a Non-ſuit; becauſe the *Caſe of a Non-ſuit does* NOT *here exiſt*: For if the Plaintiff be non ſuited, He muſt be out of Court as againſt *Both* Defendants; whereas He has *obtained Judgment* againſt *One* of them. 359.

Notice—

Of an *Inquiſition at the Aſſizes*, upon an *untimely Death*, where the Coroner has omitted to take One—is neceſſary. 19.

Of being *elected on the Livery* of a Company—given, "to "attend at the next Court of Aſſiſtants, to take upon him "the Livery." 239, 240.

1ſt. The Notice ſhall be *intended* to be regular: *Per Deniſon.* 240.

2dly. A Livery-Man of the Company *ought to know* when the *next* Court is: *Per* Lord *Mansfield.* 239. Yet *N. B.* This Court was *uncertain*: For the *Time of Holding* it was appointable by the Maſter and Warden. *Held.*

To *Corporators*—Of Courts, which their general Duty obliges them to attend—Where it muſt be *perſonal.* 540, 541. See *Diſfranchiſement.*

Nuſance—

Calling a Thing a Nuſance (in a Plea) will *not make* it ſo: This can *not alter* the Law. 267.

The Perſon injured by a Nuſance may not *abate* the *Whole* of it, where it ariſes only from Exceſs; but only *ſo much* of it, as by its *Exceſs* above what is allowable, conſtitutes the Nuſance. 267, 268.

In occaſioning *noxious* and *offenſive* Stenches, in a *Pariſh*, NEAR the King's Highway, and NEAR ſeveral Dwelling-Houſes. 336, 337, 338. See *Indictment* for a Nuſance.

Offices.

GRANTS of them, by Biſhops. *Page* 221 to 226. See *Biſhops*.

Orders

Of Juſtices are intitled to all *favourable Preſumptions*. 246, 247, 248. See this at large under Title, "Juſtices of "Peace."

Of Seſſions, upon a *Turnpike-Act*, for *digging Materials* in PRIVATE *Soil*. See *Turn-pikes*.

An Order *needs not be ſo ſtrictly in Form*, as an *Indictment* muſt: An *Alternative* Charge is *not good* in an *Indictment*; but *may be good*, in an Order. 400. This was an Order on 11 *G*. 2. *c*. 19. § 3. for preventing Frauds by Tenants: The Orders were affirmed; though it was objected, as follows, *viz*.

1ſt. That it is only an *alternative* Charge "That the "Defendant aided and aſſiſted in removing OR con-"cealing the Tenant's Goods." *ibid*.

2d. It is not charged "That the *Tenant* Himſelf *did* "remove them;" nor "That the Defendant aided "and aſſiſted HIM." *ibid*.

To appoint *Overſeers*—appointing MORE *than* FOUR, is bad. 452.

For *aſſeſſing one Pariſh*, in AID of another; purſuant to 43 *Eliz*. *c*. 2. § 3.

1ſt. If within the *ſame Hundred*, Two Juſtices have Juriſdiction. 576, 577.

2d. If the *Hundred is not able*, Then the SESSIONS are to aſſeſs any other Pariſh within the *County*. *ibid*.

3d. The *two* Juſtices muſt *ſhew* that both Pariſhes are within the ſame Hundred, or *Diviſion ſynonymous or equivalent to Hundred*. 577.

* Orders of Removal.

* I have abridged the Caſes under this Head, very fully; for the accommodation of Gentlemen who give their Aſſiſtance at the Quarter Seſſions.

The general Rule how to *title* all Caſes of this Sort. 52, 53.

*No. 131. The Juſtices have *no Power* to remove a married Woman from her *Huſband's* OWN *Property*, upon her being *only* LIKELY to become chargeable. 53.

* N. B. These Numbers correſpond with the *Quarto* Edition of my Settlement-Caſes; wherein all theſe Caſes are publiſhed *at large*; together with 130 others *prior* to them, and likewiſe ſuch as are *ſubſequent* to them.

No. 132. The Tenant's being *rated* AND *paying the* LAND-*tax* amounts to ſuch a Notice as gains him a *Settlement* under 3, 4 *W*. & *M*. *c*. 11. § 6: Although he be *repaid* it again, by the Landlord, (or a Tide-Waiter, by the Collector:) And this, though it be *two Quarters only*. 247, 248.

An *Apprentice* (by Pariſh-Indenture) *voluntarily permitted* by her Maſter to go and work elſewhere for her OWN *Benefit*, and accordingly ſerving another Maſter in another Pariſh above 40 *Days*; then returning to her Indenture-Maſter, and ſtaying with him only 8 Days, at the End of which, her Apprenticeſhip *expired*, is ſettled in that other Maſter's Pariſh, where She *ſerved* 40 *Days*: For, ſuch ſervice was UNDER *the Indenture*, which was *never diſcharged*. *Page* 307, 308. N°. 133

The WIFE *and* four Children of *Richard Crockford* jun. were removed from *Elvetham* to *Alton*: Which Order was confirmed by the Seſſions; and *both* Orders were *affirmed* by this Court. This *Richard Crockford's Father and Mother* came by CERTIFICATE from *Alton to Elvetham*; where this Son was BORN, SUBSEQUENT *to the Certificate*. He became a *hired ſervant* to Sir *Harry Calthorpe*, at *Elvetham* (*the Place of Sir Harry's Reſidence*,) and ſerved him, in all, ten Years. But the LAST 40 DAYS *of the ſecond Year*'s Service was *at Scarborough*: Where, without ever quitting his Service, He *applied* to his Maſter, at the End of the ſecond Year, to *make a new Agreement* for another Year. His Maſter ſaid "It "*would be Time enough*, when they returned Home to "*Elvetham*." Whereupon the Servant *continued on*, for about ſix Weeks, till they returned. Then he was AGAIN *hired* by his ſaid Maſter, for a *third* Year, at advanced Wages; and *ſerved it out*, in *Elvetham*; and continued 7 Years more in the ſame Service, in *Elvetham*. After which, he married this Wife, and had theſe Children. 308. N°. 134.

1. The *Wife and Children* were *properly removed* to the Settlement of the *Huſband* and *Father* of them: And if *He* ſhould *in future* come to *Elvetham*, he may be removed by another Order. 308 to 314.
2. *Alton*, which gave the Certificate, was the proper *Settlement*. 310 to 314.
   - 1ſt. Though a Servant *may* gain a Settlement in a Place where his *Maſter has none*, or where the *Maſter never reſides himſelf*; ibid.
   - 2dly. Yet this Servant gained *no Settlement at Scarborough*. ibid.
   - 3dly. Here was *not* any *Finiſhing or End* of the original Contract, by what paſſed at *Scarborough*: On the contrary, it was adjourned and *continued*; And the *Re hiring* for the third Year was *tranſacted at Elvetham*. So that the Whole was a CONTINUATION of the *Original Service* firſt BEGUN *under the Certificate* from *Alton*. ibid.

An Order of CONFIRMATION (upon Appeal to the Seſſions) is *Concluſive*, and *binds all the World*: But an Order N°. 135.

of DISCHARGE or REVERSAL is only final *between the two then contending Pariſhes*: And no *Third* Perſon is bound thereby. And *this Diſtinction* is fully ſettled, and quite juſt and reaſonable: For the two contending Pariſhes have been fully heard; The third Pariſh, not at all. *Page* 354 to 356.

No. 136. The CHILD *of a Certificated Perſon*, having regularly gained
No. 137. a Settlement in a *third* Pariſh, may, AFTER *that*, gain One in the certificated Pariſh. 357 and 358.

No. 138. A *bonâ fide* Purchaſer of a *ſmall* Purchaſe *under* 30*l.* Value, if *rated and paying* towards the public Taxes of the Pariſh, does, by ſuch being rated and paying, gain a Settlement that ſhall *continue beyond* the Time of his Inhabitancy, 370. For

1ſt. The 9 *G.* 1. *c.* 7. § 5. was only levelled againſt *fraudulent* Purchaſers. *ibid.*

2d. The 3, 4 *W.* & *M. c.* 11. § 6. is *not affected* by 9 *G.* 1. *ibid.*

3d. The Pariſh is *not obliged* even by 17 *G.* 2. *c.* 38. to rate a Perſon *unfit* to be rated. 371.

No. 139. A Hiring for Eleven Months "and to *give a Month's Ser-* "*vice in*, beyond the Eleven Months"—is a Hiring *for a Year*. 372.

No. 140. A Queſtion was made concerning the Neceſſity of a Pauper's taking out *Adminiſtration*, in order to gain a Settlement: But this Queſtion was not now determined; becauſe it was holden to be ſtated as a Fact, "That the Pauper had a "derivative Settlement" (*excluſive* of the Claim under Adminiſtration.) 435.

No. 141. A Hiring for One *Year*, to wit, from *Michaelmas* 1752 to *M.* 1753, *with Liberty* "to *let himſelf for the Harveſt-* "*Month*, to *any other* Perſon," is *no* Hiring *for a Year*. 496, 497.

The *Conſtruction* has been *favourable* as to the *Service*; but *more ſtrict* as to the *Hiring*. ibid.

No. 142. An Apprentice (by *Pariſh Indenture*, till 24) was, by a moſt explicit and formal AGREEMENT *between his Maſter and Himſelf*, DISCHARGED from his Apprenticeſhip, And the Indentures delivered up; the Apprentice being *then* UNDER 21. He then left his Maſter; and was regularly hired for a Year, *and ſerved for a Year* in *A*. He gains no Settlement in *A*. 500, 501.

1ſt. The *Infant's* Conſent is of no Validity: (For, being *under* Age, He *could not conſent* to his being diſcharged) 501.

2d. The *ſubſequent Service* of the Apprentice, under the Hiring for a Year, gained *no Settlement*; *as being* by the Maſter's Leave and Conſent, and ſo a Service UNDER *the Indenture*. 501.

3d. For this is NO EXPRESS *and* EXPLICIT *Leave* given by the Maſter *to a* PARTICULAR *Service*; but intended to be *general*, and even founded on a Miſtake. *ibid.* See *ante*, under *Page* 307, 308.

Daniel

Daniel Harriſon, *Mary* his Wife, and *William* their Son (an *Infant*) went *by* CERTIFICATE to reſide at *Cold-Aſhton*. *Her Father*, being poſſeſſed of a *Term* in a *Tenement in Cold-Aſhton*, died *inteſtate*, leaving Her and *Five other* Children. *Daniel* and She and *William* (then under 5 Years of Age) *entered and took Poſſeſſion*; and *Daniel* and *Mary* have *occupied ever ſince*, (being 29½ Years:) But NO *Adminiſtration* was ever granted either to *them*, or to *any other* Perſons. *William* lived with his Father and Mother *in* the ſaid Tenement, till ABOUT 8 or 9 Years ago: When he married, and lived ſeparate, but gained no other Settlement. *Daniel* (the Father) ſerved the *Office of Tithingman* for the ſaid Pariſh, for *half* a Year, about 25 Years ago; and the ſame Office again, for *another Half* Year, about 5 Years ago; the Cuſtom there being "to ſerve it "for *Half a Year* only, at a Time." All of them were ſettled at *Cold-Aſhton*. *Page* 510. No. 143.

1ſt. The 9, 10 *W.* 3. *c.* 11. mentions the "Taking a *Leaſe of* "*a Tenant of* 10*l. per Annum* Value," or "*Executing ſome* "*annual Office in the Pariſh*," as the ONLY Methods by which a *Certificated* Perſon can gain a Settlement. 507.

2d. But by a *reaſonable Conſtruction*, an ESTATE of a Man's *own* from which He *cannot be removed*, is *within* this Act. *ibid.*

3d. The Office ſtated in this Cuſtom is *not* an ANNUAL Office; but an Office for *Half* a Year only. 504.

4th. *Daniel*, the Father of *William*, here acquired *ſuch a Right* as rendered him *irremovable*. 508, 509, 510.

1ſt. It was a 20 *Years Poſſeſſion*: Which will maintain or defend even an *Ejectment*. ibid.

2dly. *After ſo long* a Poſſeſſion, a *regular Title to it* ſhall be *preſumed*. ibid.

3dly. As to the *general* Queſtion "Whether the *mere Poſ-* "*ſeſſion* of a Term, by the *ſole* Next of Kin, WITHOUT "*Adminiſtration*, be ſufficient to render irremoveable;" it is out of the preſent *particular* Caſe.

5th. *William*, the SON of *Daniel*, here gained a *derivative* Settlement in *C. A.* from his Father. *Ibid.*

1ſt. The *Children* of all Parents muſt have the Settlement of the Father, TILL *they acquire* Another for themſelves. *Ibid.*

2dly. A *critical* and *ſevere* Scanning of Words and Expreſſions ſhall *not* be admitted, to prevent this. *Ibid.* No. 144.

An Order of *Seſſions* made on Appeal is *not obliged* to ſtate the Caſe *ſpecially*: And, where their Expreſſion is not abſolutely clear and explicit, they ſhall be *intended* to have done *right*. 514.

An *Unmarried* Perſon, *not having Child or Children*, may be *hired* for a Servant, and gain a Settlement by the Service: (by 3, 4 *W.* & *M. c.* 11. § 7.) 546, 547, 548. No. 145.

1ſt.

1ſt. Such Perſon muſt be unmarried, *when hired.* *Page* 546, 547, 548.

2d. One has hired *conditionally*, being *then married*; His *Wife died*; then the Hiring was *completed* by the Principal, who ſtood at *Liberty to have diſſented.* This Man was holden unmarried, when hired. *Ibid.*

No. 146. An *Infant*, of 8 Years of Age, was hired, to work in Silk-Mills for 3 *Years*: But the Maſter was *not* to find *Diet*, or *Lodging*; And the SERVICE was to be *only Eleven Hours* in the ſix Working-Days; and *all the Reſt* of the Time, as well as on *Sundays*, the Child was to be at its *own Liberty* and its own Maſter. This gains no Settlement. 565, 566.

1ſt. Here is no Sort of Foundation for One, upon the Foot of an Apprenticeſhip. *Ibid.*

2d. As a *Hiring and Service* – It gains None. *Ibid.* For

1ſt. The *Infant is not bound*: Though an Infant has an *Election* to affirm his Contract if he pleaſes. 566.

2dly. The *Contract* itſelf is *not a Hiring for a Year*, within 3, 4 *W. & M. c.* 11. § 7. *Ibid.*

No. 147. Theſe Determinations (upon the Poor-Laws) ought to be according to *plain Common Senſe*, without *Subtlety or Nicety.* 593, 595.

A *Hiring* for a Year, was neceſſary by 3, 4 *W. & M. c.* 11. § 7: A *Service* for a Year, was added by 8, 9 *W.* 3. *c.* 30. § 4. 593. And by the Latter, a CONTINUING *and* ABIDING in the *ſame* Service, during the Space of one WHOLE Year, is made eſſential. *Ibid.*

1ſt. The *Maſter's Leave* makes it a *Continuance* in the ſame Service. 593

2d. If there be a *continued* Service for a whole Year, it is enough; though the Hiring and the Service be *not* Both under the *ſame Contract*: Provided there be *both* a Hiring for a Year, *and* a Service for a Year. 592 to 594.

3d. A *ſmall Interruption* of the Service ſhall not hurt. *Ibid.*

4th. But a *total Diſſolution*, or an *abſolute Diſcharge*, or what *entirely breaks the Connection*, is fatal to the Settlement: For it muſt be an *uninterrupted (i. e* an *undiſſolved) Continuance* of the ſame Service. 593, 594, 595.

No. 148. *Rating* the *Houſe* to the Poor's Tax, *without* expreſsly *naming the Tenant*, is ſufficient to gain a Settlement: The Land-tax, Poor's Rates, and all other parochial Taxes were *paid by the Tenant*; and the Receipts given to him, by the Overſeers, in *his own Name*; and He had *agreed to pay them.* This Rate was "on *T. C.*" (who was the Landlord) "or Tenant." 623. *V. Supra* (under *Pages* 247 and 368.)

Overſeer.

A *Juſtice of Peace*, who was alſo a *Half-pay Lieutenant of Marines*, appointed Overſeer of the Pariſh where he reſides and acts. *Page* 246, 247. See *Juſtice of Peace.*
No greater Number than FOUR can be appointed. 445 to 453.

Outlawry.

Error (Writ of) to reverſe an Outlawry. (The preſent One was in *London*, for *High Treaſon* in diminiſhing the Coin.) 638 to 943.

1ſt. After Plea, the Defendant may have *Counſel*, upon the *Collateral* Matter. 638.

2d. If, upon being arraigned, the Defendant pleads *Non-Identity*, it is to be *tried inſtanter*. 638, 639.

3d. If Error *in Fact* be alledged, the Attorney-General may *confeſs* it, tho' not true; But he can *not* do ſo, if the Error aſſigned be an Error *in Law*. 642.

4th. Eight Errors were objected; (which were not now determined).

1ſt. That the ſecond *Capias* ought to have had either 3 or 4 *Months* between its Teſte and Return. 639.

2d. That there was a *Diſcontinuance* of Proceſs. 639.

3d. That the Outlawry was ſaid to be *pronounced* by Mr. *King*, the Coroner: Whereas the *Lord Mayor* is *perpetual Coroner*; and the *Recorder* is to *pronounce* the Outlawry. 639.

4th. That he is *not* ſaid to be outlawed *ſecundum legem et conſuetudinem regni*. 640.

5th. That the *Name of Office (Vicecomites)* is not ſet to the Return of the ſecond Exigent. 640.

6th. That the Writ of *Proclamation* is *teſted* and *returned* upon the ſame Day. And the Return does *not ſpecify* the particular Proclamations. 640.

7th. That the Defendant was *out of the Kingdom* when the Outlawry was pronounced. 640.

8th. That the *Huſtings* are *not* ſaid to be holden "*in and for* the City of *London*." 640.

Parish-Clerk.

THE *Office* and the *Fees* are (Both of them) of *temporal* Cognizance. *Page* 367, 368. See *Prohibition*.

Parish-poor. See *Orders*.

RETURNING to the Parish *from whence removed*, without bringing a Certificate, is punishable by two Statutes, *viz.* 13, 14 *C.* 2. *c.* 12. § 3. and 17 *C.* 2. *c.* 5. §. 1. by Commitment to the House of Correction &c. 596, 597.

1st. Qu. Whether a *previous Conviction* be necessary, upon the *former* Act: (The *Latter* expresly requires it.) 598 to 604.

2d. Qu. Whether WIFE returning *with* her Husband to the Parish from which both were legally removed, and bringing no Certificate, is *liable* to Commitment, as well as the Husband. *Ibid.*

3d. Though 13, 14 *C.* 2. *c.* 12. § 3. is in expres Words, *tied up* to Persons going TO WORK in another Parish, yet it has always been considered as *general*, and *not* being tied up to that particular Case of going *to work*, only. 601.

4th. But a general Commitment to the House of Correction, "UNTIL *discharged by due Course of Law*," (indefinitely, and without Limitation of Time) of *not* good within *either* Act: For the former requires *Punishment as a Vagabond*; and the latter requires the being kept to *hard Labour*, but *limits* the Confinement "*not to exceed One Month*." 602, 603.

5th. An *Action* lies by *Husband and Wife*, against the Justice, for this illegal Commitment; although it arose from the Husband's illegal Act. *Ibid.*

Parliament.

Lords of it—Their Privileges. See *Privilege*.

Payment of *Money into Court*. See *Practice*.

Peace. See *Security of the Peace*, *Attachment*, *Articles*.

Peers.

Their *Privileges*. See *Privilege*.

Plea.

Plea.

Immaterial. See *Repleader*.
Liberty to *amend* it. See *Repleader*.
Iſſuable (within the Terms of the uſual Judge's Order, giving Time to plead, upon certain Terms, whereof One is "to "plead an *Iſſuable* Plea—") A Plea (to an Action upon "a Bail-Bond) of 23 *H.* 6. *c.* 10. and that the Bond was "taken for Eaſe and Favour *&c*;" *is an iſſuable* Plea, within ſuch Order. *Page* 605.
So is a Plea of *Tender*. 59. See *Pleading*.
But *not* a Plea of *Abatement*. Ibid. See *Pleading*.

Pleading.

An *Account ſtated* is *no Extinguiſhment* of the original Debt: And therefore it is *no Plea in Bar* to a Demand of a Debt of the *ſame Degree*. Neither can a *Note* of Hand be pleaded in Bar to an Action upon Simple Contract: Though a *Bond* may; becauſe it extinguiſhes the Debt. 9. But One Bond cannot be pleaded to another. *Ibid.*
A Plea of *Tender*, is an *iſſuable* Plea, within a Judge's Order giving Time to plead, upon the uſual Terms "of "*pleading iſſuably &c.*" 59
A Plea *in Abatement* is not ſo; (becauſe it tends to delay the Plaintiff.) *Ibid.*
A Plea *calling* a Thing a *Nuſance*, cannot alter its Nature and *make* it ſo. 267.
Repleader. See *Repleader*.
Iſſue muſt be taken upon a ſingle Point: But it is not neceſſary that that ſingle Point ſhould conſiſt of a *ſingle* FACT *only*. (As if the Defendant juſtifies under a Right of *Common*, It is a good Replication and not multifarious, to traverſe "That the Cattle were the Defendant's *own*, AND that "they were *levant and couchant*, AND that they were *com-* "*monable* Cattle.") 320.
Where the *whole* Plea is denied, the Replication muſt conclude to the *Country*: Where only a *particular Fact is denied*, it muſt conclude with an Averment. *Ibid.*
Where a *corrupt Agreement* is pleaded, the Replication may *either* reply "That the Bond was given upon another "Account," and traverſe the corrupt Agreement with an *abſque hoc*; OR may deny the corrupt Agreement *directly*, and conclude to the *Country*. 320, 321.

Condition

Condition to *indemnify* againſt all Claim of Dower BY *a Widow*, and againſt all *Coſts Charges &c* ariſing *therefrom*. Breach aſſigned, in a Bill in Chancery brought BY *the Widow's* SECOND HUSBAND, for *Arrears* of Dower: In which Suit, the Plaintiff in the preſent Action *had expended* 8l. 10s. *for Coſts*. Judgment for the Plaintiff on Demurrer. *Page* 575, 576.

1ſt. This is within the *Words* and *Meaning* of the Condition. 576.

2d The Obligee, being already damnified, has an *immediate* Right to be *reimburſed, without waiting* the Determination of the Suit in Chancery. 576.

Policy of *Inſurance*.

On an *Eaſt-India Ship*, its Body, Tackle, Apparel &c, and other *Furniture*; againſt Perils of the Sea &c, and *Fire* (expreſsly;) to any Ports and Places beyond the *Cape of Good Hope*, and back to *London*. At *Canton*, the Ship ſtayed *to clean and refit*: In Order to which, All the *Sails and Furniture* were TAKEN OUT *of the Ship*, and put into a *Warehouſe* built for that Purpoſe ON A SAND-BANK in the River there: *Where* they were accidentally *burnt*. This was found to be the *well known and eſtabliſhed* USAGE; and to be *prudent*; and to be for the general *Benefit* of the *Inſurers* and all concerned 347 to 353.

1ſt. This is a Loſs *within the Words and Meaning* of the Policy. 347 to 353.

2d If the Loſs happens by the *Variation of the Chance, or Alteration of the Voyage*, or other *Fault* of the *Owner* OR *Maſter* of the Ship, the Inſurer ceaſes to be liable. *Ibid.*

3d. Otherwiſe, if the Things be done in the *uſual Courſe of the Voyage*, or *ex juſtâ Cauſa*. Ibid.

4th. So, if a Ship warranted to depart *with Convoy*, goes out of the Way *in Order* to have the Opportunity of Convoy, This is *no Deviation*. Ibid.

5th. The *eſſential Means* and neceſſary intermediate Steps muſt be taken to be inſured, as well as the End. *Ibid.*

6th. What *muſt neceſſarily be underſtood*, makes *a Part of the Policy*, as much as what is expreſſed. *Ibid.*

7th. This is a Loſs within the *Voyage*, though it happened (ſtrictly ſpeaking) upon *Land*. Ibid.

8th. But the Inſured have no Right to *change the Bottom*; though to a better or ſtronger Ship. 351.

9th. A *Deviation* (without Neceſſity) *determines* the Policy, and *diſcharges* the Inſurer. 351.

DOUBLE *Inſurance*—What *is*, and what is *not* ſo; and its *Effects*. 490 to 495. See *Inſurance*.

Poor-

Poor-Tax. See *Orders*, *Statutes*, (43 *Eliz. c.* 2. § 1.). *Rates.*

Powers.

The Limitation and Modifying of Eſtates by Virtue of Powers *came from Equity*, into the Common-Law, with the *Statute of Uſes. Page* 120. *V. infra, ſub pa.* 1146, 1147.

The *Intent* of the Parties who gave the Powers, ought to *govern every Conſtruction* of them. 120.

They ſhall *not be exceeded*; nor their *Conditions evaded*; but ſhall be STRICTLY *purſued*, in *Form* and *Subſtance*: And all Acts under a Special Authority, *not agreeable to it*, nor *warranted by it*, are VOID. 120.

"*To make Leaſes*," is, of all kinds of Powers, the moſt frequent. *Ibid.*

1ſt. The Plan of this Power "to make *Leaſes*" is for the *mutual Advantage* of Poſſeſſor and Succeſſor. 121.

2d. The *Succeſſor* therefore muſt *not be prejudiced* in point of *Remedy* or any other Circumſtance of *full and ample Enjoyment*. Ibid.

3d. The two uſual Methods of Leaſing are, either "at "the *beſt Rent*," or "upon *Fines*:" And the Conditions in Favour of the Succeſſor muſt be *purſued* not only literally, but *ſubſtantially*. 121, 122.

4th. If the *ancient Rent* is to be reſerved, It muſt be reſerved with ALL the *beneficial Circumſtances*. *Ibid.* and *ſpecifically* too, (not generally only;) that the Remainder-Man may be under *no Difficulty in avowing*: For otherwiſe, it will be a *void Leaſe*, as againſt *Him*; though good againſt the Owner of the Inheritance. *Ibid.*

5th. It can be *no* Leaſe, unleſs both Landlord and Tenant are bound in *mutual* Stipulations. 122.

6th. Where the *Leſſee* never executed any *Counter-part*; never *entered*; never *covenanted to pay the Rent*; never *conſented*; never *accepted* the Leaſe, nor appears to have been in *Poſſeſſion* of it, or perhaps ever *known of it*; and conſequently, was *never bound* by it: Such a Leaſe is no Execution of the Power. *Ibid.* Eſpecially, as there was *no Clauſe of Re-Entry* in it. 125.

7th. For every *fraudulent, unfair, prejudicial* Execution of ſuch a Power, *in Reſpect of thoſe in Remainder*, is VOID at Law. 125.

8th. But it is *no Objection* to a Leaſe made under a Power, "That it is *in* TRUST *for him who executes the Power*;"

" *Power*;" Provided the *legal Tenant be bound*, during the Term, in all requiſite Covenants and Conditions. *Page* 124.

9th. The Leaſe intended by every Power of Leaſing, is the *uſual Huſbandry* Leaſe, reſerving a *Rack-Rent*. 124.

10th A Leaſe, by Virtue of a Power, *takes Effect out of the Settlement* that gives the Power. 123.

Practice. See *Proceſs*, *Proceedings*, *Declaration*, *Pleading*, *Repleader*.

All *enlarged Rules* " to ſhew Cauſe," made in a preceding Term, muſt be brought on before the laſt Week of the Term next following; unleſs particular Leave be given to poſtpone. 9.

Verdict againſt Evidence is, in general, a good and conſtant Reaſon for granting a *new Trial*. 12. But

Such a Verdict being found *for the Defendant*, and the Action appearing to be *frivolous*, *trifling*, and vexatious, the Court *refuſed* to grant the *Plaintiff a new Trial*; notwithſtanding its being a *Verdict againſt Evidence*. Ibid. *V. infra*, 54, 353, 664, 665.

All *Cauſes ſtanding for Argument* in the ſpecial Paper, to come on in the ſame *Order* in which they are there entered; and *to continue to ſtand*, till they ſhall be argued: And none to be put off, without a previous Special Application to the Court. 52.

A *New Trial* ſhall not be granted, merely to *gratify litigious Paſſions*, upon every Point of *Summum Jus*, or in *hard Actions*, or after *unconſcionable Defences: Though* the Verdict be *againſt* Evidence and the ſtrict Rule of Law. 54. *V. ſupra, Pa.* 12. *infra Pa.* 664, 665.

All Motions really and fairly ready at the Bar, were ordered to be made REMANETS; and to be heard (though they take up 2, 3, or more Days,) before the Dignitaries and Seniors at the Bar ſhall be again called upon to move. 57, 58.

This Regulation of Motions at the Bar was made by *Lord Mansfield*, at his firſt coming upon the Bench; but was otherwiſe, *till* his Lordſhip's Time, and eſpecially in Ld. C. J. *Holt's* Time; when the junior Barriſters uſed to attend many Days together, *without Opportunity* of making their Motions. *Ibid.*

Judgment entered *nunc pro tunc*. See *Judgment*.

A *Motion* for a *new Trial*, and a *Motion in Arreſt of Judgment*, may *not* be made *both together*: The former *muſt precede*. 334.

Bail—The different Terms upon which they ſhall have *Time to ſurrender* their Principal, *after a Writ of Error* brought by him. 340. See *Bail*.

A *Verdict* obtained *by Stratagem* or *unequitable Methods*, ſhall be ſet aſide WITHOUT Coſts on either Side, at leaſt; if

if not with *Coſts to be paid by* the Party who *ſo* obtained it. 353. *V. ſupra*, under *Pa.* 12 and 54.

Scire facias againſt *Terre-Tenants*—See *Common Recovery.*

The Rule "about NOT *quaſhing on* MOTION, but putting "to demur," does not hold; where the Court which is proceeding, *wants Juriſdiction* in the Caſe. 388 to 391.

An *Eaſt-India*-Merchant being *bound, at Bombay*, in a Bond conditioned "*to appear* in this Court, to anſwer the *De-* "*mands of a Black Merchant there*," was permitted to *appear here* and enter into a Recognizance with Sureties, in the Penalty of that Bond, and with the *like Condition*; after Notice to the *Eaſt India*-Company. 398.

The Court will *not* ſet aſide (even on an Offer to pay the Coſts of it) a *regular Non proſ.* obtained by the Defendant againſt a COMMON Informer: Whatever they might have done, if the Plaintiff had been the Party *really injured*, ſuing for Juſtice and Reparation. 401, 402.

Scire facias againſt Bail, AFTER *Surrender* of the Principal. See Bail.

Of Bringing *into Court*, in *Term* time, upon a *Habeas Corpus* iſſued in *Vacation* and returnable *immediatè*. 460. See *Habeas Corpus*, (under *Pa.* 460, 542, 606.)

Rule to *pay Money into Court*, and have it ſtruck out of the Declaration; upon Payment of COSTS; (in an Action upon the Caſe, for the Uſe and Occupation of a Houſe;) was diſcharged as to the *Coſts*: *i. e.* permitted to be done WITHOUT *paying Coſts*:) the Plaintiff's Action appearing to be brought and kept on Foot, *very* OPPRESSIVELY. 578, 579.

On the *laſt Day of a Term*, an *Attachment* cannot be moved for; Except 1ſt. for Non-Payment of *Coſts*; Or 2dly. Againſt a Sheriff, for not returning a Writ. 651. It may be moved "to quaſh an *Indictment*" (on the laſt Day of a Term:) But "*not* to quaſh an *Order*." Ibid.

Prebend: Prebendary.

Profits during Vacancy—Upon a Queſtion about the *Right to them*, an *Action* at Law, or a *Bill* in Equity, is the proper Method: *Not a Mandamus to the Viſitor*, 567. See *Mandamus.*

Preſcription—See *Declaration.*

For a *Right of* BURIAL in a Chancel, claimed as belonging to his Meſſuage: It was ſtated "That he had ſuch a "Right; and that 2*s. was due to the Pariſh, for* EVERY "Perſon buried in the Chancel of that Church." 443, 444.

1ſt. This Payment is *not* a Condition *precedent*, or Parcel of the Preſcription: *Page* 443, 444.
2d. But either a *Cuſtomary Payment*, or, at leaſt, a *Collateral* Preſcription. *Ibid.*

Privilege

Of *Attornies*—See *Attorney*.
Of LORDS *of Parliament*—does *not extend* to prevent the Court of King's Bench from enforcing *Obedience to a Habeas Corpus* "to bring up a *miſ-uſed Wife*," by ATTACHMENT. But the Circumſtances of the Caſe muſt be ſuch as *neceſſarily require* ſuch a Method: And it muſt be *cautiouſly executed*. 631 to 636. (Where ſee all the Particulars of Earl *Ferrers*'s Caſe, previous and ſubſequent to his Counteſs's Swearing the Peace againſt him. *V. infra*, next Article.
No *Peer* or *Lord of Parliament* hath Privilege of *Peerage* or of *Parliament*, againſt being compelled by Proceſs of the *Courts in Weſtminſter-Hall*, to pay Obedience to a Writ of *Habeas Corpus*, directed to him. 632.

Precedendo

Denied to a *Burrough-Court*, who had tried a Cauſe WITHOUT *the* PRESENCE *of an Utter-Barriſter* of 3 Years Standing: (For, by 21 *J.* 1. *c.* 23. § 6. Such an Utter-Barriſter ought, in all Events, to be PRESENT *at the Trial.*) 515.

Proceedings

Set aſide, for want of *Attorney's Name* to the Proceſs; It being ſet thereto *without* his Authority. 20.

Proceſs.

Attorney's Name. See *Proceedings*.

Prohibition

To a *Viſitor*. See *Viſitor*.
Declaring in Prohibition—198, 199.
1ſt. The *Defendant* in Prohibition has, perhaps, a Right to *demand* it, where the Opinion of the Court is againſt him. 198, 199.

2d. But the *Party applying* for a Prohibition has *no* Right to inſiſt upon declaring, when the Court are clear that his Application is groundleſs. *Page* 198 to 205.

To the Spiritual Court, to ſtay Proceedings on 5, 6 *E.* 6. *c.* 4. § 2: Which Act contains 3 diſtinct Clauſes levelled againſt 3 diſtinct *Offences in Churches and Church Yards*; *viz.* 1ſt. Quarrelling, Chiding, or Brawling by *Words* only; 2dly. *Smiting*, or laying *violent Hands*; 3dly. Striking with a *Weapon*, or *drawing One* with Intent to ſtrike. (For which 2d Offence, the Offender is *ipſo facto*, to be deemed *excommunicate*.)

1ſt. The Eccleſiaſtical Court may proceed upon the *two firſt* Clauſes; and are *not* to be prohibited. 243, 244. But

2dly. Upon the *third* Clauſe, there muſt be a *previous Conviction*, and a Tranſmiſſion of the Sentence, and a Declaration. *Ibid.*

3dly. But if they proceed for *Damages*, on either Clauſe, they ſhall be prohibited. 244.

4thly. The Proceedings of the two Courts are *diverſo intuitu*: This, to puniſh; that, to amend. 243, 244.

To the *Spiritual* Court—AFTER *Sentence*—

1. Shall *not* go, unleſs Defect of Juriſdiction appears upon the *Face* of the Libel. 315.

2. Nor even where they have *tried* a *Cuſtom or Preſcription*; Provided they have adjudged againſt it. *Ibid.*

3. *Otherwiſe*, where they have tried a Cuſtom or Preſcription, and adjudged *for* it; becauſe they will eſtabliſh it upon *leſs* Evidence than the Common Law requires.) 315.

To the *Spiritual* Court, to ſtay Proceedings for reſtoring a Pariſh Clerk, ſhall be granted: (For the *Office* and *Fees* are of *Temporal* Cognizance.) 367, 368.

To the *Spiritual* Court, to ſtay their Proceedings in a Cauſe relating to the *Will* of a *Feme Covert*, who had Power (by her Marriage-Settlement) *to make a Will*: Qu. Whether ſuch Will muſt not be *proved* in the Spiritual Court. 432. See *Baron and Feme*.

Promiſſory Note. See *Bill of Exchange*.

If made payable *certainly and at all Events*, it is a good Note, within 3, 4 *Ann. c.* 9. § 1. Otherwiſe, if it be *contingent*, and *uncertain* whether it ſhall *ever be paid* at all, or not. 227, 228. See next below.

A promiſſory Note given TO *an Infant*, payable *when He ſhall come of Age* and *ſpecifying the particular Day*, (*viz.* 12th *June* 1750,) is of the *former* Kind: *Ibid.* For

1ſt. This is *certain!* and *in all Events* payable. *Ibid.*

2dly. The *Diſtance of Time* makes no Difference. *Ibid.*

3dly.

3dly. Nor the *Adding* "that 'tis the Day of the Infant's Coming of Age." *Page* 227, 228.

4thly. It is *Debitum in præſenti*; though *ſolvendum in futuro*. 228.

In the Name of *Two*, but *ſigned by* ONE *only*; promiſing to pay on the Death of *G. H.* "PROVIDED He leaves Either "of Us ſufficient to pay the ſaid Sum; OR *if* We ſhall "be otherwiſe to pay it." 325, 326.

1ſt. This is *not a Negotiable Note* within 3, 4 *Ann. c.* 9. § 1. being *only eventual*, not abſolute. *Ibid. V. ſupra.*

2dly. If it had, the Declaration might have been againſt that One, *ſingly*, who ſigned it. 325.

3dly. But this Declaration was upon an *abſolute* Note: Which was not ſupported by producing this Conditional Note in Evidence; but was a *Variance*. 325, 326.

Quakers

REFUSING to pay *Tithes*, *Rates* or other *Rights*, *Dues* or *Payments* to Churches or Chapels, for the Stipend or Maintenance of the Miniſter or Curate, are *compellable* thereto, if *not exceeding* 10l.) by an Order of any *Two Juſtices* of the County or Place, *Others than Patrons* or Perſons any Way *intereſted* (who may alſo order *Coſts*, not exceeding 10*s*) Which Order may be *appealed* from, to the General Quarter *Seſſions*; but ſhall *not* be removed into *any other* Court, *unleſs* the TITLE of ſuch Tithes Dues or Payments ſhall be in Queſtion.

1. The Act of 7, 8 *W.* 3. *c.* 34. § 4. extends only to great or ſmall *Tithes* and *Church*-Rates; and is temporary: But the ſubſequent Act of 1 *G.* 1. *Stat.* 2. *c.* 6. § 2. makes the former perpetual, and *extends* it to *any* Tithes or rates, or *any* cuſtomary or other *Rights*, *Dues or Payments* belonging to any Church or *Chapel*, which of Right by Law and Cuſtom ought to be paid for the Stipend or Maintenance of any Miniſter or Curate officiating in any Church or Chapel. 486.

2. Both Acts direct that the Proceedings ſhall *not be removed* into ANY *other Court*, (except the Appeal to Seſſions,) *unleſs* the TITLE ſhall be in Queſtion. 487.

3. They mean that the Title be *really* in Queſtion, and upon ſome *real Foundation* of Controverſy: But the *more general Scruple* of any Quakers to pay any

any Demands of this Nature, and their conſequential Aſſertion "That the Right is in Queſtion," (without ſhewing *upon what Foot*,) is *not* a ſufficient Ground for removing ſuch Orders. *Page* 488, 489.

4. Theſe two Acts were made in *Favour* to, and for the *Eaſe and Benefit* of Quakers: And it would *fruſtrate their End and Intention*; if they might be thus *evaded*, either by their Obſtinacy or mere general Scruples. *Ibid.*

5. *Certiorari* having iſſued, grounded upon a *poſitive*, but *general* Affidavit on the Part of the Quakers, "That they *controverted the Title* to theſe Tithes "before the Juſtices; and that the Title to them "*was* REALLY *in queſtion*;" The Writ was *ſuperſeded* (upon its appearing that this general Allegation and conſequential Aſſertion had no better Foundation than their Scruples or Obſtinacy as above,) *quia improvidè emanavit*; the *Return taken off the File*; and the *Order remanded*. 488, 489.

6. But theſe Acts *never meant* to give the *Juſtices* Juriſdiction to determine upon the *Right* and *Title*, where they are *really* in Diſpute and Queſtion between the Parties. 487, 489.

Recognizance.

TO remove an Indictment from the Court of *Oyer and Terminer* at *Hicks's Hall*, is a Recognizance at *Common Law*, and not within the *Stat.* of 5, 6 *W. & M. c.* 11. § 2. 10.

Such a Common-Law Recognizance, not within the Statute, ſhall be diſcharged, upon the Terms of it being complied with; *without* Payment of any *Coſts*. 10.

To remove an Indictment from the Quarter-Seſſions, upon 5, 6 *W. & M. c.* 11. § 2. ſhall *not* be diſcharged before *Payment of Coſts* to the Proſecutor (after Conviction,) if the Proſecutor be PROVED *by Affidavit* to have been a *Civil Officer &c*; ALTHOUGH his Name be NOT INDORSED as ſuch, upon the Indictment: For the 3d Section does *not* require ſuch an Indorſement, as *neceſſary* to the Court's giving him *Coſts*; (though the 2d Section does indeed direct it to be done.) 54, 55.

But NO *Coſts* at all are payable on that Act; *unleſs* the Indictment was brought by the *Party grieved*, or by a Juſtice, Mayor *&c.* or other *Civil Officer* proſecuting as ſuch. 431.

Recovery. See *Common Recovery.*

Rent.

Act of 4 G. 2. c. 28. "for the more effectual preventing "Frauds committed by Tenants, and for the more eaſy "Recovery of Rents and Renewal of Leaſes." *Page* 616. See *Statutes, Ejectment.*

Repleader

Shall be *granted*, where the Iſſue joined is *immaterial* and *void*, and does *not* at all *determine the Right:* Unleſs the Caſe itſelf appear to be *ſo bad* that no *Manner of Pleading* could have helped it. 301, 302.

So, where the Iſſue joined is ſo very *inconcluſive*, that the *Court* cannot tell how to *give Judgment* upon it. *Ibid.*

But where it clearly appears that the Defendant *can have no Title or Defence*, whatever Shape or Form the Pleadings may be put into, *there* Judgment ſhall be given and entered againſt him, *without* awarding a Repleader. 299 to 306.

If a Repleader be awarded, it muſt be WITHOUT *Coſts.* 304.

In an Information in Nature of *Quo Warranto*, againſt a Mayor, He claims under an Election and Swearing purſuant to a *Mandamus* under 11 G. 1. c. 4. and ſhews an Election accordingly, and that he was ſworn purſuant to the ſaid Statute: But when he comes to *ſpecify* the Manner of his being *ſworn in*, He, (by Miſtake, in following an old Precedent) ſhews a *Swearing purſuant to the Charter*, but *not agreeable to the Directions of the Mandamus-Act.* The Republication takes Iſſue on *this* Swearing-in: Which was found for the King; the Defendant *not being permitted to give Evidence* of his being ſworn *in purſuant to the Act*; (which, however, was the Fact.) The Court held it right, that he was *not* permitted to give *ſuch Evidence.* But as *this* and *Eleven* other Iſſues were found for the King *without Evidence*, they conſidered the Defendant's whole Title, as *One entire Title* (though ſplit into Parts by the Replication;) and were unanimous in *ſetting aſide the Verdict* UPON *Payment* of *Coſts* by the Defendant, and in giving him Liberty to *amend his Plea*; as the beſt Method of Coming at the *true Juſtice of the Caſe.* 301 to 307.

Return

Return

To a *Certiorari*—may be taken *off the File*, on the Writ's being *ſuperſeded, quia improvidè emanavit. Page* 487, 488, 489. See *Certiorari.*

Of "*Nulla Bona*" upon Executions againſt *Bankrupts.* 31 to 38. See *Bankrupt*; and *poſt.* 817 to 820.

Roads. See *Highways.*

Rules and Practice of the *Court.* See *Practice.*

The great *End* of the general Rules of the Court is "to "*do Juſtice:*" And therefore the Court ought to ſee that it be *really* attained. 301.

Security of the Peace. See *Articles of the Peace.*

Seiſin. See *Diſſeiſin.*

THE *Idea* of Seiſin, according to the *Old Law*, in the Times of *Feudal Tenures.* 107.

It was the *Completion* of that *Inveſtiture*, by which the Tenant was admitted into the Tenure; and *without* which, no Freehold could be conſtituted or paſs. 107.

Livery of Seiſin—

1ſt. Is *immaterial*, under a Leaſe by Virtue of a *Power:* Becauſe the Leaſe *takes Effect out of the Settlement*, which gives the power. 123.

2d. *Mere taking Livery*, without Entry or Occupation, is *not* ſufficient to *charge with the Rent* reſerved. 123.

Settlement

Of *Poor.* See *Orders of Removal.*

Of *Poor.* The Determinations upon theſe Laws ought to be according to *plain common Senſe*; without *Subtlety* or *Nicety.* 593, 595.

Sheriff. See *Return, Bankrupt.*

Soldier. See *Habeas Corpus.*

No Perſon liſted according to 29 *G.* 2. *c.* 4. § 14. ſhall be *taken* OUT *of* His Majeſty's Service by any Proceſs other than for ſome *Criminal* Matter. *Page* 339, 340.

But He may be *Surrendered* by his *Bail*, in their own Diſcharge. *Ibid.*

1ſt. An *impreſſed Man*, in Cuſtody at the *Savoy*, may be brought up by his Bail, by *Habeas Corpus:* And when ſurrendered, is to be firſt committed to the *Marſhal*, and *inſtantly delivered* to his *Military Keeper* who brought him up. *Ibid.*

2dly. A Soldier *at Large*, (not in Cuſtody at all,) is to be firſt committed to the *Marſhal*, but *inſtantly ſet at large: Per* Lord *Mansfield.* Ibid.

A *Volunteer* under 30 *G.* 2, *c.* 8. is *not* privileged from Arreſts: But Perſons *compelled againſt their Wills*, are privileged by § 20 of that Act. 466.

Statutes. See *Conſtruction.*

5 *Eliz. c.* 4. See *Trade* and *Trader:* See *Indictment* alſo; and *Information.*

5, 6 *W. & M. c.* 11. § 2. See *Coſts, Recognizance.*

5, 6 *W. & M. c* 11. § 3. The Proſecutor being a civil Officer *&c* may be *proved by Affidavit*; It is not eſſentially neceſſary that it be *indorſed.* 54, 55. See *Recognizance.* And *V. infra.*

18 *Eliz. c.* 3. See *Orders of Baſtardy*

6 *G.* 2. *c.* 31. § 1. See *Orders of Baſtardy.*

22, 23 *C.* 2. *c.* 25. See *Conviction.*

5 *Ann. c.* 14. See *Conviction.*

3, 4 *Ann. c.* 9. § 1. See *Promiſſory Note.*

5, 6 *E.* 6. *c.* 4. See *Prohibition.*

3, 4 *Ann. c.* 9. § 7, 251, 252. See *Indictment.*

31 *Eliz. c.* 5. § 7. 251, 252. See *Indictment.*

9, 10 *W. c.* 15. See *Arbitration.*

11 *G.* 1. *c.* 4. See *Mandamus, Pleading.*

12 *G.* 1. *c.* 12. §. 1, 2. See *Declaration* on *Bail*-Bond.

24 *G.* 2. *c.* 4. §. 14. See *Soldier, Bail, Habeas Corpus.*

14 *G.* 2. *c.* 17. § 1. concerning Judgment as in Caſe of a Nonſuit. See *Non-ſuit, Judgment.*

8, 9 *W.* 3. *c.* 11. § 7. concerning Suggeſtion of Death of the Party, upon the Record. See *Suggeſtion.*

5 *Eliz. c.* 4. concerning exercising a Trade in a *Village*. See *Information, Trade.*

3, 4 *W. & M. c.* 11. § 6. concerning Notice. See *Orders of Removal,* (under *Pa.* 247, 370, 371.)

9 *G.* 1. *c.* 7. § 5. } See *ibidem.*
17 *G.* 2. *c.* 38. }

26 *G.* 2. *c.* 54. (a *Suſſex* Turnpike Act.) See *Turnpikes.*

29 *G.* 2. *c.* 67. impowering to *dig Materials* in *private Soil.* See *Turnpikes.*

1 *Jac.* 1. *c.* 22. § 50. (about Cutting Leather) gives the Juriſdiction to the Lord *Mayor of London* IN SESSIONS, within the City and *within* 3 *Miles Compaſs of it.*

1ſt. This is *no* ſummary *Juriſdiction* given to the *Mayor,* PERSONALLY. 389, 390.

2dly. But *only as Head* of this Court of Seſſions. *Ibid.*

3dly. A *Information* therefore will not lie. *Ibid.* But ſhall be quaſhed on Motion. *Ibid.*

4thly. But the Juriſdiction muſt be exerciſed according to the Courſe of the *Common* Law; *i. e.* by *Indictment.* Ibid.

7 *Anu. c.* 12. See *Ambaſſadour.*

9 *Ann. c.* 20. § 4, 5. See *Information in Nature of Quo Warranto, Mandamus.* And

☞ *N. B.* This Act is *legally, clearly,* and *correctly* drawn: *Per* Lord *Mansfield* 407. Judge *Powell* was the Perſon who *drew* it: *Per Foſter* Juſtice. 409

5, 6 *& M. c.* 11. § 3. *No Coſts* are payable; unleſs the Proſecutor be the *Party grieved,* or a *Civil Officer &c.* 431. See *Recognizance, Certiorari.*

21 *Jac.* 1. *c.* 19. § 2. See *Bankrupt,* (under *Pa.* 439, 440.)

43 *Eliz. c.* 2 § 1. See *Overſeers.*

30 *G.* 2 *c.* 8. § 5. & 20. See *Soldier.*

17 *G.* 2. *c.* 16. A private Act for *dividing and incloſing the Common Fields* of *Flecknow* in *Warwickſhire.* See *Highway.*

1 *Jac.* 1. *c.* 22. "The Duty of Tanners, Curriers, Shoemakers, and OTHERS Cutting of *Leather.*

1ſt. This Act was intended *to ſecure the* STAPLE *of Leather*; and is NOT *confined* to Perſons *occupied in the Trade* of Cutting it. 498, 499.

2dly. The ½ of the Penalty under § 50. belongs to the Lord of the Liberty of the Place *where* the Offence was committed; *notwithſtanding* the Extenſion of the Mayor of *London*'s Juriſdiction to 3 Miles Compaſs round it. 498, 499. (*V. Supra* under *Pa.* 389, 390.)

21 *Jac.* 1. *c.* 23. § 6. providing that this Act ("to prevent "*Removal of Suits from* INFERIOR *Cours of Record,*") ſhall *only extend* to *ſuch* inferior Courts where an *Utter-*

Barriſter is Judge or Deputy, *and there* PRESENT. *Page* 515. See *Procedendo*.

21 *H.* 8. *c.* 13. § 1. prohibiting *Spiritual* Perſons from *taking Lands to Farm*, creates a *new* Offence, and *preſcribes a particular Remedy:* Therefore *no Indictment* lies upon it. 545.

3, 4 *W.* & *M. c.* 11. § 7. allowing *unmarried* Perſons, *not having Child or Children*, to be hired and gain Settlements. See *Orders of Removal* (under *Pa.* 547, 548.)

29 *Car.* 2. *c.* 3. Of Frauds. See *Deviſe*.

26 *G.* 2 *c.* 31. for regulating the Manner of *licenſing Alehouſes*. 556 to 565. See *Licence, Information* (againſt Juſtices for refuſing.)

3, 4 *W.* & *M. c.* 11. § 7. concerning Settlements under a *Hiring* FOR A YEAR. 565 to 567. See *Orders of Removal*.

9 *Ann. c.* 20. § 4. Several Informations in Nature of *Quo Warranto conſolidated* into one againſt all the Defendants. 573. See *Information*.

43 *Eliz, c.* 2. § 3. about aſſeſſing one Pariſh in AID of Another. 576, 577. See *Orders*.

8, 9 *W.* 3. *c.* 25., § 1, 2, 3.
9, 10 *W.* 3. *c.* 27. § 1, 2, 3.
12 *W.* 3. *c.* 11.
3, 4 *Ann. c.* 4, § 1, 4.
} See *Hawkers, Pedlars* and *Petty Chapmen:* and See *Conviction*.

4 *G.* 2. *c.* 28. § 2. (See *Rent, Ejectment.*) It preſcribes two Manners of recovering in an Ejectment brought by the Landlord; *viz.* by *Default*; and on *Trial*. In both which, it muſt be made to appear "That *Half a Year's* "*Rent was due*; that there was *no ſufficient Diſtreſs*; and "that the Leſſor had *Power to re enter*." In the former Caſe of Judgment againſt the *Caſual Ejector* (and ſo alſo upon Non-Suit on not confeſſing Leaſe, Entry and Ouſter,) This muſt be made to appear by *Affidavit:* In the latter Caſe, the ſame Thing muſt be *proved* upon the Trial. 620.

1ſt. This is a very different Caſe from that of the *Defendant in an Action for the* MESNE PROFITS, not being eſtopped from going into the Title, by a Judgment againſt the *Caſual* Ejector, (to which Judgment *He was no Party*) 620.

2dly. The End and Intent of this Act was to *limit and confine the Tenant* to *Six Calendar Months*, after Execution executed, for offering Compenſation or applying for Relief in Equity. 619 to 621.

4, 5 *Ann. c.* 16. § 8.
3 *G.* 2. *c.* 25. § 14.
} See *View*.

18 *E.* 1. "*Quia Emptores Terrarum*"—its Effect. 108. See *Alienation*.

13 *E.* 1. "*De Donis conditionalibus*"—when and how *evaded*. 115.

14 *G.* 2. *c.* 20. is a *retroſpective* and *declaratory* Law: and ſeems to have reſtored the *Original Tenant to the Præcipe.* It proceeds upon the Parties to a Recovery having *Power to ſuffer it.* *Page* 116. See *Common Recovery, Tenant in Tail.*
21 *Jac.* 1. *c.* 16. "Of Limitations." 119. See *Ejectment.*
1 *Eliz. c.* 19. § *ult.* (concerning Grants by Biſhops.) 221 to 226. See *Biſhops, Grants, Offices.*
1 *Jac.* 1. *c.* 15. § 2. 467. See *Bankrupts.*
7, 8 *W.* 3. *c.* 34. § 4.
1 *G.* 1 *Stat.* 2. *c.* 6. § 2. } 485, 486. See *Quakers, Tithes.*
19 *G.* 2. *c.* 37. 492. See *Inſurance (double.)*
51 *H.* 3, de *Diſtrictione Scaccarij* does *not extend* to Diſtreſſes in *Nature of Executions* for *Poor's Rates* and ſuch like. 586, 588. See *Diſtreſs.*
13, 14 *C.* 2. *c.* 12. § 3. 17 *G.* 2. *c.* 5. § 1. relating to Poor Perſons *legally removed,* and afterwards RETURNING *to the Pariſh from whence removed,* without bringing a Certificate. 596 to 603. See *Pariſh-Poor.*

Suggeſtion

Of the *Death* of One of the Parties. 366. See *Ejectment* (againſt Two: One dies *&c.*)

Sunday

Included in Days of Notice. 56. See *Declaration* (*de benè eſſe.*)

Superſedeas

To an *Action.* See *Practice, Priſoners.*

Tax

CORPORATION of the *Royal Exchange-Aſſurance* Company in *London,* are *liable* to be aſſeſſed in their *Corporate* Capacity, AS *a Corporation.* 156 to 158.
Firſt—The 300001. or rather 1300000l. (*viz.* the Sum of Money exempted by 6 *Geo.* 1. *c.* 18. § 2, 5, 10.) is *confined* to the *Original* Fund and Company eſtabliſhed by that Act; and does *not extend* to the *preſent* Corporation, *ſince* founded upon a *Charter* of the Crown, which neither did *nor could* give any ſuch *Exemption.* 156.
Secondly—

Secondly—They ought to be rated AS *a Corporation*; *not* as *Individuals* (in their reſpective Wards. *Page* 157.

Term (of *Years*)

Long Terms for Years are *modern* Contrivances, unknown to our Anceſtors, and *different* from their Notions concerning Terms for Years 217.

Copyholds, for Terms of Years. 218. See *Copyholds*.

Leaſe for *Years*, *if* Leſſee ſo long live; Remainder to Another, for and during the *Reſidue* of the *ſame* TERM. This (notwithſtanding former Caſes which ſay, "That "the Reſidue of the *Term* is *void*, becauſe the Term is "at an End by the Death of the Leſſee,") ſhall be conſtrued That the Remainder-Man ſhall enjoy during all the Reſidue of the YEARS *to come*; where the manifeſt *Intention* of the Parties appears to be ſo. 285, 286. See *Deeds* (under *a.* 285, 286.) and ſee *Caſes denied*.

The Word "Term" may ſignify the *Time*, as well as the *Intereſt*. 285, 286.

The *Old* Caſes held "That there could be *no Remainder* of "a Term, after an Eſtate for Life; either by *Deed*, or "*Will*." But when *long and beneficial* Terms came in Uſe, ſuch Limitations were firſt allowed to be created by *Will*, (under the Name of *Executory Deviſes*:) And afterwards, Remainders were allowed by *Deed*, for the Reſidue of the *Years*, but *not* of the *Term*. But *new* Limitations of Terms are of *general Uſe*; their Bounds ſettled; and the *Rules* concerning them *certain and eſtabliſhed*. 285, 286.

Term.

Motions allowable or not allowable, on the *laſt Day* of it. See *Practice*.

Tithes.

Payable by *Quakers*. 485. See *Quakers*.

Trade and Traders. See *Bankrupt*.

A Perſon *not* qualified to exerciſe a Trade, *himſelf*, by having ſerved an *Apprenticeſhip*, entered into *Partnerſhip* with *a qualified* Partner, and only Sharing the Profits and ſtanding the Riſques of the Partnerſhip, WITHOUT *ever exerciſing or interfering* in the Trade himſelf *perſonally*, is not within the prohibitory and *penal* Act of 5 *Eliz. c.* 4. ſo as to be liable to the Penalties of it. *Pa.* 5 to 10.

Reſtraint

Reſtraint of it. See *By-Law.*
Regulation of it. Se *By-Law.*
In a *Village.* See *Information.*

Treaſon.

Dr. *Henſey*'s Trial, for High Treaſon in *adhering to* and *aiding and correſponding with* the King's Enemies: The ſummary Hiſtory of it. *Page* 643 to 652.

1ſt, The Grand Jury brought in this Bill, *by itſelf.* 643.

2. The Indictment *was read to him,* upon his Arraignment: Though He had a *Copy* of it five Days before. *Ibid.*

3. Papers *found in the Cuſtody* of the *Perſon Himſelf* may be *read* againſt him, if proved by the Evidence of thoſe who have *ſeen him write,* or know his Hand. 644.

4. Where the *Defendant gives no Evidence,* the Counſel for the Crown may decline to *ſum up their own.* 645.

5. Letters of Intelligence written and ſent, *in order to be delivered to the Enemy,* are, though INTERCEPTED, Overt-Acts of both the following Species of Treaſon, *viz. Compaſſing and Imagining the King's Death,* and *adhering to his Enemies.* 646, 647, 650.

6. *Levying War* is an Overt Act of *compaſſing* the King's Death. 646.

7. *Overt Acts of the Intention of Levying War* are Overt Acts of ſuch *Compaſſing.* Ibid.

8. Soliciting a *Foreign Prince,* even *in* AMITY with this Crown, to *invade* the Realm, is ſuch an *Overt Act.* Ibid.

9. *Some One Overt Act* muſt be proved *in the County* where the Indictment is laid. 647.

10. A *Letter dated* from a *Place which lies* in that County, is ſufficient for ſuch Proof. *Ibid.*

11. A *Month*'s Time was allowed, between Sentence and the Day appointed for Execution. 651.

Trial

New. See *New Trial.*
Put off, upon Account of a *Libel* publiſhed with *Intention to Influence* the Jury: But ſhall *not be again put off* till after Trial of an Information againſt the mere *Pamphlet-Sellers.*

Trial at *Bar.*

Concerning a Right to a *Track-Path* on each Side of the River *Tees* (alternately) for *towing,* without paying any Acknowledgment—The Right found. 292.

Con-

Concerning *Fines* payable to the Lord of the *Barony of Gilleſland*, and their *Liberty of Exchanging*—Found for the Tenants. *Page* 333.

Trover

Is a *Fiction*, in its *Form*: But, in its *Subſtance*, a *Remedy*. 31. It is a Remedy to recover the *Value* of perſonal Chattels, wrongfully converted by Another to his own Uſe. 31. The Form ſuppoſes that the Defendant may have come *lawfully* by the Goods. 31. And it lies in *ſuch* Caſes. *Ibid.* *Where* they were *taken wrongfully* and by Treſpaſs, the Plaintiff, if he brings this Action, *waves* the *Treſpaſs*, and *admits* the *Poſſeſſion* to be lawful. *Ibid.*

It may be brought for an *unlawful Converting*; though the *Original Poſſeſſion* was *unlawfully obtained*: But *no Damages* can be recovered in *this* Action, for the *mere Taking*. 31.

It is an Action of *Tort*: But the *whole Wrong* conſiſts in the wrongful *Converſion*. Ibid.

Two Things only are neceſſary to be *proved*, to intitle the Plaintiff to recover in it; *viz.* *Poſſeſſion*, in the Plaintiff; and a *wrongful Converſion*, by the Defendant. *Ibid.*

It is maintainable by the Aſſignees againſt a Sheriff, who *ſells* the Goods of a Bankrupt, (before taken by him in Execution,) AFTER *Aſſignment*: For *after Aſſignment* they become the *Property of the Aſſignees, from the Time* of the Bankruptcy, by *Relation*. 31, 32.

Trover therefore lies againſt the Sheriff, for this *unlawful Converſion*: Though this Relation ſhall *not* make him a *Treſpaſſer* or *Wrong-Doer*, where the *Original Taking* of the Goods was *prior* to the Aſſignment, and *lawful*. 35 to 38.

In Trover, the Plaintiff *waves the Treſpaſs*; and relies upon the *unlawful Poſſeſſion*, only. 31.

Turnpikes.

It is neither uſual nor convenient, to erect them in the *Middle* of Great Towns. 376, 377.

The Town (itſelf) of *Battel* is EXCLUDED out of 26 *G.* 2. *c.* 54. *Ibid.*

An Act impowers to *dig Materials* in PRIVATE *Soil*: (29 *G.* 2. *c.* 67.) The Seſſions make an *Order* upon it: Which was quaſhed. 383.

1ſt. EXPRESS *Adjudication* is *not* neceſſary, where the Recitals and Allegations are *ſtrong*, and *Concluſions* are actually drawn. 382.

2d. Yet the *Foundations* of their Authority ought to appear *upon the Face* of the Order, ſome how or other. *Page* 382.
3d. *Notice* to the OWNER of the Soil is not always neceſſary. 382.
4th. But *Satisfaction* is, wherever *He* is injured. *Ibid.*
5th. The Order muſt SPECIFY what Materials can *not* be found in or upon the *Waſte*, and what *may* be found in the private Soil. 382.
6th. And alſo *fix* the *particular Part* of the Private Property. *Ibid.*
7th. For they cannot order a Digging over the *whole* Eſtate, in general. 382, 383.
8th. Nor can they dig the private Property, to TRY *for Materials*, without *knowing* or at leaſt having a *reaſonable Proſpect*, that they ſhall find them there. *Ibid.*

Verdict

AGAINST *Evidence*. See *Practice, New Trial.*
Without Evidence. See *Repleader, New Trial.*
Obtained by Stratagem or *unequitable* Methods. 352, 353. See *Practice.*
Wrong delivered by the Foreman—may be amended. 384, 385.
May NOT *be ſet aſide* by an INFERIOR *Court*; except for *Irregularity or* Surprize: But *not* upon the Merits. 571, 572.
Shall *not* be *ſet aſide* for *Exceſſiveneſs of Damages*, in Caſes turning upon CIRCUMSTANCES, which are ſtrictly and properly WITHIN *the* PROVINCE *of the Jury*: (As, for *Criminal Converſation* with the Plaintiff's Wife.) 609.
Where the *Evidence* which ſupports it, is *clear and full*, ſhall *not* be ſet aſide. 394 to 398.
But where the Verdict is *againſt* Evidence, or againſt the Weight of it *greatly preponderating*, it ſhall. *Ibid.*
Fraud will *invalidate*, in a Court of *Law*, as well as in a Court of Equity: And where it has interfered, the *Common-Law Courts* have a *concurrent Juriſdiction* with a *Court of Equity*, to ſet aſide the Verdict. *Ibid.*
Set aſide. The *Antiquity* of this Practice; The *Rule* of it; The *Reaſonableneſs* of it. *Ibid.*
General Verdicts can *only* be ſet right by a New Trial. 393. See *New Trial.*

Moſt

Moſt General Verdicts *include legal Conſequence*, as well as Propoſitions of Fact. *Page* 393.

Veſting

Of *Legacies*, See *Legacy*.
Of *Remainders*. See *Deviſe*.
Of *deviſed Intereſts*. See *Deviſe*.

View.

By 4, 5 *Ann. c.* 16. § 8. in any *Action* brought in any of the Courts of Record at *Weſtminſter*, where it ſhall *appear to the Court* that it will be *proper and neceſſary* that the Jurors ſhould have a View, They may Order *ſpecial* Writs of *Diſtringas* or *Habeas Corpora* to iſſue, commanding the Sheriff to have Six OF THE FIRST TWELVE of the Jurors therein named, or ſome greater Number of them at the Place in queſtion *&c.*: And the Sheriff ſhall, by a *ſpecial return*, certify "That a View has "been had."

And by 3 *G.* 2. *c.* 25. (the Ballotting-Act) § 14. it is provided "That where a View ſhall be allowed, Six *of* "*the Jurors named in the Pannel*, or more, ſhall have the "View, and ſhall be the *firſt ſworn*, (or ſuch of them as "appear,) before any Drawing."

But as the having a View was *not*, by either of theſe Statutes, made a Matter *of Courſe*, (though ſuch a Practice had prevailed, and had been abuſed to the Purpoſes of Delay,) The Court thought it their Duty to take Care that their Ordering a View ſhould not *obſtruct Juſtice*, and prevent the Cauſe from being *tried*: And they reſolved not to order One any more, without a full Examination into the Propriety and Neceſſity of it; unleſs the Party praying it would come into ſuch Terms as might prevent an *unfair Uſe* being made of it. For they were All clearly of Opinion, that the Act of Parliament meant "that a View ſhould not be granted, unleſs the "Court was ſatisfied that it was *proper and neceſſary*:" And they thought it better that a Cauſe ſhould be tried upon a View, had by *any* Six, or by *fewer* than Six, or even *without any View*, than be delayed for a great Length of Time. 252.

Accordingly, They added a Clauſe to the uſual Rules for Views, purporting that the Party praying a View CONSENTED "That in Caſe *no* View ſhould be had; or if a "View ſhould be had by *any* of the Jurors whomſoever, "(though not being Six of the firſt Twelve;) yet the "Trial ſhould proceed, and no Objection be made on "Account *thereof*, or for Want of a *proper Return*." 256.

Since

Since which, Motions for Views are become Motions of Courſe, with ſuch additional Conſent annexed to them. *Page* 256.

See the *Form* of the *uſual* Rule, and alſo of the modern *Addition* both in Cauſes to be tried by *Special* Juries, and thoſe to be tried by *Common* Juries, reſpectively recited *verbatim*. 257, 258.

Viſitor.

The general Power of Viſitation, properly exerciſed, is *uſeful and convenient to Colleges*: *Per* Ld. *Mansfield*. 200.

The Juriſdiction of the Viſitor is *ſummary* and *without Appeal* from it. 200.

The Founder of a College may appoint a Viſitor, either *generally* or *ſpecially*. 200.

He may preſcribe *particular Modes and Manners*, as to Part. *Ibid.*

He may appoint a *Special* Viſitor, for a *particular Purpoſe*, and *no farther*. *Ibid.*

His *general* Viſitor has incidental Power, *as* ſuch: But yet he may *reſtrain* him as to *particular Inſtances*. Ibid.

No technical Form of Words is neceſſary for appointing either a *general* or a *ſpecial* Viſitor. *Ibid.* and 202. 205.

But it muſt be collected from the *whole Purview* of the Statutes conſidered together, WHAT *Power* the Founder *meant* to give the Viſitor. *Ibid.*

The Founder may make a *general* Viſitor; and yet appoint *inferior particular* Powers in Others, in the firſt Inſtance. *Ibid.*

Of St. *John's College Cambridge*——

2ſt. The *Biſhop of Ely* is Viſitor, as to the *Election of Fellows*; *Per* Ld. *Mansfield*; 201, 202.

And indeed *general* Viſitor, *except as to altering the Statutes*. 201 to 205.

2dly. And of Dr. *Keton's* ANNEXED *Fellowſhips*, as well as of the reſt. *Ibid.*

Ingrafted or *annexed* Fellowſhips in Colleges, (though ingrafted by *Indenture*) are to be conſidered as *Part of the* OLD *Foundation*. 204, 205.

And a Clauſe of *Diſtreſs*, given to a *third* Perſon, makes no Difference: For that is no adequate Remedy TO *the Fellow*, (and was given *diverſo intuitu*;) nor ought to take away the SPECIFIC *Remedy*, from the Perſon injured. *Ibid.*

Mandamus to a Viſitor, "to exerciſe his Power *over the* "*Temporalties*, in a Diſpute about the intermediate *Pro*-"*fits of a prebendal Stall*, during its Vacancy"—Denied. 567, 568. See *Mandamus*.

For, a Visitor has *no such Jurisdiction*. It must be determined according to the Course of the *Law of the Land*; As it is a Litigation not only with the Members of the Body, but with *Executors and Administrators* of deceased Prebendaries; over *whom*, the Visitor can have no Power. *Page* 567, 568.

Will

OF a *Married Woman*. 432. See *Prohibition, Baron and Feme*.



FINIS.